A NEW TREATISE ON THE LAWS CONCERNING TITHES:

CONTAINING

All the Statutes, Adjudged Cases, Resolutions and Judgments relative thereto,

UNDER THE FOLLOWING HEADS:

By a GENTLEMAN of the MIDDLE TEMPLE.

LONDON:

Printed for W. GRIFFIN, in Fetter-Lane, G. KEARSLY in Ludgate-Street, and RICHARDSON and URQUHART at the Royal-Exchange.

MDCCLXV.

LAWS

CONCERNING

TITHES.

CHAP. I.

Definition of Tithes, Parſonage, Vicarage, Impropriation, and Appropriation; and of the Origin, Nature and Several Kinds of Tithes.

IN ſome of our law books tithes are briefly defined to be an eccleſiaſtical inheritance, or property in the church, collateral to the eſtate of the lands thereof; but in others they are more fully defined to be, a certain part of the fruit, or lawful increaſe of the earth, beaſts, or men's labours, which in moſt places, and of moſt things, is the tenth part, which by the law, hath been given to the miniſters of the goſpel, in recompence of their attending their office. 11 Co. rep. 13. Dyer 84. Tithes defined.

The word *parſon*, in a legal acceptation, is taken for the rector of a church parochial, and is denominated *Perſona Eccleſiæ*, becauſe he taketh upon him the parſonage, that is, the care of *perſonating*, or repreſenting the church; and therefore he is ſaid to be ſeiſed *Jure Eccleſiæ* (as a huſband Parſon, who.

is *Jure Uxoris.*) So that in his perſon, the church may ſue for and defend her rights, &c. *God.* 185.

Alſo, when a church is full, it is ſaid to be *Plena & Conſulta*, of ſuch a one *parſon* thereof, *i. e.* full and provided of a proper perſon or repreſentative, or one who may *Vicem ſeu Perſonam Eccleſiæ gerere*; and ſuch a one is called *perſona imperſonata*, *Parſon imparſonee*, or parſon imperſoned, that is, a rector or parſon in poſſeſſion of a church parochial, whether the ſame be preſentative or appropriate; and the tithes and revenues of ſuch a church are commonly called *parſonage*. 1 Inſt. 300.

Parſon impartonee.

Parſonage.

Vicar, who.

A *Vicar* is one who has a ſpiritual promotion or living under the parſon, and is ſo denominated *quaſi vice agens perſonæ*. And ſuch a promotion or living is called a *vicarage*, which is a part or portion of the *perſonage* allotted to the vicar for his maintenance and ſupport.

This part or portion is in ſome places an annual ſum of money certain; but in moſt places it is a part of the tithes in kind, which moſt commonly is the ſmall tithes; and in ſome places he has a part of the great tithes, and alſo of the glebe; and ſuch a one is called a *vicar endowed.*

Vicar endowed.

Thus he who has the right to, and poſſeſſion of, the leſs part, is called the vicar, and he that has the other, and greater part of the tithes, &c. is called the *parſon*, who in ſome pariſhes is a clergyman, and ſometimes the miniſter or incumbent of the ſame church; but in other places he is a mere layman, and cannot ſupply the church but by a ſpiritual vicar; and this ſo poſſeſſed by a layman, is called an *impropriation*, and himſelf the *impropriator*. Keb. 906.

Impropriation.

Appropriation.

But an *appropriation* is when ſuch a parſonage (or vicarage, or other church preferment) is in the hands or poſſeſſion of ſome eccleſiaſtical perſon, and his ſucceſſors, and can be made only to a body

body politick, or corporation ſpiritual, and hath ſucceſſion, whereby ſuch body becomes perpetual incumbent of the benefice appropriated, and ſhall for ever enjoy the tithes and other profits, and the cure of ſouls belonging thereto. *Cowell.* But the words *impropriation*, and *appropriation* are frequently confounded in the law books.

Biſhop *Barlow*, *Selden*, father *Paul*, and others have obſerved, that neither tithes nor eccleſiaſtical benefices, (which are correlative in their nature) were ever heard of for many ages in the chriſtian church, or pretended to be due to the chriſtian prieſthood; and, as that biſhop affirms, no mention is made of *tithes* in the grand *Codex* of canons, ending in the year 451; which, next to the bible, is the moſt authentic book in the world; and that it thereby appears, during all that time, both churches and churchmen were maintained by free gifts and oblations only. Barlow's remains p. 169. SELDEN of tithes, 82. See Watſon's Compleat Incumbent, *p.* 3, 4, *&c.* Origin of tithes.

And Mr. *Selden* has ſhewn us, that tithes were not introduced here in *England*, till towards the end of the eighth century, *i. e.* about the year 786, when pariſhes and eccleſiaſtical benefices came to be ſettled, for as is ſaid, tithes and eccleſiaſtical benefices being *correlative*, the one could not exiſt without the other; for whenever any eccleſiaſtical perſon had any portion of tithes granted to him out of certain lands, this naturally conſtituted the benefice, the granting of the tithes, of ſuch a manor or pariſh, being, in fact, a grant of the benefice; as a grant of the benefice did imply a grant of the tithes: And thus the relation between patrons and incumbents was analogous to that of lord and tenant by the feudal law. Selden of tithes, 86, &c.

About the year 794 Offa, king of Mercia, (the moſt potent of all the Saxon kings of his time in

this Iſland) made a law, whereby he gave unto the church the tithes of all his kingdom, which the hiſtorians tell us was done to expiate for the death of Ethelbert king of the Eaſt Angles; whom in the year preceding he had cauſed baſely to be murdered. But that tithes were before paid in England by way of offerings, according to the ancient uſage and decrees of the church, appears from the canons of Egbert, archbiſhop of York, about the year 750; and from an epiſtle of Boniface archbiſhop of Mentz, which he wrote to Cuthbert archbiſhop of Canterbury about the ſame time; and from the ſeventeenth canon of the general council held for the whole kingdom at Chalchuth, in the year 787. But this law of Offa was that which firſt gave the church a civil right in them in this land, by way of property and inheritance, and enabled the clergy to gather and recover them as their legal due, by the coercion of the civil power. Yet this eſtabliſhment of Offa reached no further than to the kingdom of Mercia, over which Offa reigned, until Ethelwulph, about ſixty years after, enlarged it for the whole realm of England. Prideaux on tithes. 165, 167.

Several kinds of tithes.

Tithes, with regard to their ſeveral kinds or natures, are divided into predial, mixed and perſonal:

Predial tithes are ſuch as ariſe merely and immediately from the ground; as grain of all ſorts, hay, wood, fruits, herbs; for a piece of land or ground, being called in Latin *prædium*, (whether it be arable, meadow, or paſture) the fruit or produce thereof is called *predial*, and conſequently the tithe payable for ſuch annual produce is called a predial tithe. Watſ. 49. 2 Inſt. 649.

Mixed tithes are thoſe which ariſe not immediately from the ground, but from things immediately nouriſhed by the ground, as by means of goods

goods depaſtured thereupon, or otherwiſe nouriſhed with the fruits thereof; as colts, calves, lambs, chickens, milk, cheeſe, eggs. Watſ. c. 49. 2, Inſt. 649.

Perſonal tithes are ſuch profits as do ariſe by the honeſt labour and induſtry of man, employing himſelf in ſome perſonal work, artifice, or negotiation, being the tenth part of the clear gain, after charges and expences, according to a perſon's eſtate, condition, or degree, are deducted. Watſ. c. 49. 2 Inſt. 649.

No perſonal tithes ſhall be paid out of the clear gains of the party. Mich. 14 Ja 13. R. per Curiam. 1 Rol. Abr. 656.

As if the owner of a ſhip lends it to mariners to go to an iſland for fiſh, upon a certain quantity of fiſh to be paid to him upon their return; no tithes upon their return ſhall be paid by the mariners to the parſon out of thoſe fiſh, which the owner ſhall have for the hire of his ſhip, becauſe this is a perſonal tithe, and for that it is but of the clear gain; and ſo in Devon, upon the hire of a ſhip or boat to take pilchards or herrings. Mich 14 Ja. B. R. per Doderidge, in Goſlin and Horden's caſe. 1. Rol. Abr. 656.

If a man purchaſes an houſe for 300l. and ſells it again in a ſhort time for 500l. yet no tithe ſhall be paid of the gain thereof, for this is againſt the common law. M. 11 Ja. B. R. between Davies and Tollin reſolved, and a prohibition granted. 1 Rol. Abr.. 657.

By Stat. 2 and 3 Ed. 6. Cap. 13. Sect. 7. Every perſon exerciſing merchandizes, bargaining and ſelling, cloathing, handicraft, or any other art or faculty, being ſuch perſons and in ſuch places as within theſe forty years have uſed to pay perſonal tithes, or of right ought to pay, other than ſuch as the common day labourers, ſhall yearly at or before Eaſter pay for his perſonal tithes, the tenth

part of his clear gains, his charges and expences, according to his eſtate or degree, to be deducted.

Sect. 8. In all ſuch places where handicraftſmen have uſed to pay their tithes within theſe forty years, the ſame cuſtom ſhall continue.

Sect. 9. If any perſon refuſe to pay his perſonal tithes it ſhall be lawful to the ordinary of the dioceſe where the party is dwelling, to call the party before him and examine him, by all lawful means, other than by the parties oath, concerning the payment of the perſonal tithes.

A parſon libelled in the ſpiritual court *againſt an Inn-keeper for tithes of the profits of his kitchen, ſtables, and wine-cellar*, and alledged in his libel, that he made great gain in ſelling his beer which he bought for 500l. and ſold it for 1000l. that negotiando and trafficando, he gained in the whole 3000l. and better; the court granted a prohibition. 2 Bulſt. 141. Mich 11 Jac. Dolly v. Davis.

It was decreed in the Houſe of Peers, on appeal from the Court of Exchequer, that the tithes of a mill *are perſonal* tithes, againſt ſeveral ſeeming authorities or doubts in the books; and that in conſequence of their being perſonal tithes, not the tenth toll or tenth diſh of the corn ground, belongs to the perſon, but the *tenth part of the clear profits*, after the charges of erecting the mill, and the other charges of ſervants, horſes, and other expences deducted. Abr. Equity Caſes 366. Newt. v. Chamberlain.—S. C. cited 2 Williams's Rep. 463. As determined in the houſe of Lords upon an appeal from a decree of the court of Exchequer, where the bill was brought for the tithes of a malt mill in Tiverton in Devonſhire, and where the lords determined, with the aſſiſtance of eight judges, (whereof Holt Ch. J. was one) that mills were tithable, but that the ſame was a perſonal tithe, and ſo ought to be paid out of the clear gain after all manner of charges and expences deducted.

deducted. And upon the authority of this caſe the maſter of the rolls decreed Trin. 1728 in caſe of Carleton v. Brightwell, the mill in queſtion there to pay tithes, but they ſhould be only paid as a perſonal tithe. 2 William's Rep. 463.

Tithe for *malt-mills* is only perſonal; for it is not natural increaſe, being only profit ariſing from the invention of a machine, and the labour of man and horſe, and perſonal can only be for the tithes of the neat profit, deducting all charges Mb. Tas. January 20. 1706. Chamberlain v. Plymton.

Tithes, with regard to value, are divided into great and ſmall: *great* tithes; as corn, hay and wood. *Degge*, part 2. c. 1. *Small* tithes; as the predial tithes of other kinds, together with thoſe which are called mixt and perſonal. Gibs. Cod. 663. Great and ſmall tithes.

But it is ſaid that this diviſion may be altered (1) by cuſtom, which will make wood a ſmall tithe under the general words of *minutæ decimæ* in the endowment of the vicar. (2) By quantity which will turn a ſmall tithe into great, if the pariſh is generally ſown with it. (3) By change of place, which makes the ſame things, as hops in gardens ſmall tithes, in fields, great tithes. But this ſeems to be contradicted in the caſe of Wharton and Liſle. E. 5 W. where the tithe of flax, tho' ſown in great fields, was adjudged to the vicar as a ſmall tithe, Holt chief juſtice, (who was of another opinion) being abſent. 4 Mod 184. Gibs. 1663.

And Dr. Watſon is of opinion, that the quantity of land within any pariſh ſowed with any thing, cannot make the tithe of another nature; and that what is called ſmall tithes ſeemeth to be in reſpect of the thing itſelf, and not from the ſmall quantity of land ſowed therewith, whereby the tithes thereof are but ſmall and of little value;

for if that were to be the rule to determine what ſhall be ſaid to be ſmall tithes, then corn and hay in ſome places might be accounted ſmall tithes. Wats. c. 39. And according to this latter opinion the law is now ſettled; namely, that the tithes are to be denominated great or ſmall tithes, according to the nature and quality thereof, and not according to the quantity.

It is ſaid by lord Coke, and many others, that before the council of Lateran in the year 1180, a man might have given his tithes to what church or monaſtery he pleaſed. But this Dr. Prideaux doth utterly deny for two reaſons. 1. becauſe of the abſurdity of the thing; for all the laws which had been made for tithes, would have ſignified nothing, if no one had been certainly inveſted in a right to them; for in ſuch caſe, no one could claim them, and in caſe of non-payment no one could make proceſs in law for them; and conſequently, no one having a ſpecial right to demand them, it muſt have followed in practice, that what was thus paid to every ſpiritual perſon would in fact and reality be paid to none at all. 2. becauſe, before the ſaid council, there were in this land many appropriations, whereby the tithes of whole pariſhes were aſſigned to convents or other ſpiritual corporations; all which would have ſignified nothing if the pariſhioners had been at liberty to pay their tithes to what ſpiritual perſon they ſhould think fit. *Prid.* 303. But be that as it will, it is certain that now tithes of common right do belong to that church within the precincts of whoſe pariſh they ariſe. One parſon, however, may preſcribe to have tithes within the pariſh of another; and this is what is called *a portion of tithes.* One reaſon of which might be the lord of a manor's having his eſtate extending into what is now apportioned into diſtinct pariſhes; for there were tithes *before* the preſent diſtribution of pariſhes took

Portion of tithes.

took place. But whatever original theſe portions might have, they are in law ſo diſtinct from the rectory, that if one who hath them, do purchaſe the rectory, the portion is not extinct, but remaineth grantable. But as to the cognizance thereof, the caſe being between parſon and parſon, and concerning a ſpiritual matter, that belongs, like the cognizance of other tithes, to the eccleſiaſtical court .Gibs. Cod. 663.

Tithes extraparochial, or within the compaſs of no certain pariſh, belong to the crown. By the canon law they were to be diſpoſed of at the diſcretion of the biſhop; but by the law of England, all extraparochial tithes, as in ſeveral foreſts, do belong to the king, and may be granted to whom he will. And accordingly they have been actually adjudged to him, not only by ſeveral reſolutions of law; but alſo in parliament, in the caſe of the prior and biſhop of Carliſle in the eighteenth of Edward the Firſt, concerning tithes in Inglewood foreſt, to wit, that the king in his foreſt aforeſaid may build towns, aſſart lands, (or make them fit for tillage,) and confer thoſe churches, with the tithes thereof, at his pleaſure, upon whomſoever he pleaſeth; becauſe that the ſame foreſt is not within the limits of any pariſh. 1 Roll. Abr. 657. 2 Inſt. 647. Tithes in extraparochial places.

By Stat. 2 Ed. 6. Cap. 13. S. 3. Every perſon which ſhall have any beaſts or cattle titheable, depaſturing on any waſte or common ground, whereof the pariſh is not certainly known, ſhall pay their tithes for the increaſe of the ſaid cattle to the parſon, owner, or their farmers, of the pariſh or or place where the owner of the ſaid cattle inhabiteth.

Sect. 4. No perſon ſhall be ſued or compelled to pay tithes for any lands which by the laws of this realm, or by any privilege or preſumption, are not chargeable

chargeable with ſuch tithes, or that be diſcharged by any compotition real.

Libel by a vicar for tithes of young cattle, and ſurmiſed, that the defendant was ſeiſed of lands in Middleſex, of which pariſh he was vicar, and that the defendant had *common in a great waſte called Sedgmore Common*, as belonging to the lands in Middleſex, and put his cattle into the ſaid common; the defendant ſuggeſted for a prohibition that the land where his cattle went was not within the pariſh in Middleſex; but no prohibition, was granted becauſe of the clauſe in the Statute 2 Ed. 6. Cap. 13. that tithes of the cattle feeding in a waſte or common where the pariſh is not certainly known, ſhall be paid to the parſon of the pariſh where the owner of the cattle lives. Mod. 216. pl. 3. Trin 28 Car. 2. C. B. Anon.

Bill brought by the rector of S. for tithes *of beaſts fed upon a common*; defendant, by anſwer, inſiſts, that *the common extends into ſeveral pariſhes*, and that the cuſtom was that every farmer ſhould pay tithes to the rector where he lived, and that he lived in another pariſh, and he paid the tithes to that rector; but there being proof that *the cattle was driven upon that part of the common that lies in S.* there was a decree for the rector of S. but reverſed becauſe the cuſtom was good, there being no incloſures. 9 Vin. Abr. 43.

CHAP.

CHAP. II.

Out of what things tithes ſhall be paid; what lands are ſubject to tithes, and the ſeveral ſtatutes for diſſolving Abbies, Monaſteries, and other religious houſes, and veſting their lands in the King; what lands are diſcharged from tithes by theſe acts reſpectively, with a catalogue of the Monaſteries diſſolved by Stat. 31 Hen. 8. of the yearly value of 200l. and upwards; what order they were of, and the times of their reſpective foundations.

OF common right tithes are to be paid for ſuch things only as do yield a yearly increaſe by the act of God. 11 Co. 16. 1 Rol Abr. 636. Things that renew yearly.

Yet this rule admits of ſome exceptions; as for inſtance, tithe is due of ſaffron tho' gathered but once in three years; and concerning *Sylva Cædua*, or wood of twenty years growth, there is an entry in the regiſter, that conſultations ſhall be granted thereof, notwithſtanding that it is not renewed every year. Gibs. 669.

Generally of things increaſing yearly, tithes ſhall be paid only once in the year. Gibs. 669.

But this rule alſo is not univerſally true: and it is evidently againſt the rule of the canon law; which requireth that if ſeeds be ſown upon the ſame ground, and renew oftner than once in the year, the tithes thereof ſhall be paid ſo often as they do renew. Gibs. 633. And even the books of the common law hold, that *de Jure* tithes are due of the aftermath, if not exempted by preſcription. 1 Abr. Rol. 640. Tho' Lord Coke ſays; it was adjudged. 8 Jac 1. in Baxter's caſe, that tithes ſhall not be paid both of the hay, and the after-paſture. See Chap. 4.

By

Things *feræ naturæ*.

By the common law of England, there is no tithe due for things that are *feræ naturæ*, and therefore it hath been reſolved that no tithe ſhall be paid for fiſh taken out of the ſea or out of a river unleſs by cuſtom, as in Wales, Ireland, Yarmouth and other places: neither for the ſame reaſon, is any tithe due of deer, conies or the like, but if the tithe thereof be due by cuſtom, it muſt be paid. Gibs. Cod. 669. Degge p. 2. c. 8. 2. Inſt. 651.

Of common right, no tithes are to be paid of quarries of ſtone or ſlate, for that they are parcel of the freehold, and the parſon hath tithes of the graſs or corn which grew upon the ſurface of the land in which the quarry is; ſo alſo, not for coal, turf, flag, tin, lead, brick, tile, earthen pots, lime, marle, chalk, and ſuch like; becauſe they are not the increaſe, but of the ſubſtance of the earth; and the like hath been reſolved of houſes, (conſidered ſeparately from the ſoil) as having no annual increaſe, but by particular cuſtom tithes of any of theſe may be payable. 2 Inſt. 651 Gibs. Cod. 669. Mo. 908. Cro. Eliz. 277.

Foreſt land.

As lands which are in no pariſh pay tithes to the king; ſo lands lying within the precincts of a foreſt (tho' alſo in a pariſh) if they be in the hands of the king, do pay no tithes; and this privilege extends to the king's leſſee, but not to his feoffee, but if the foreſt be diſafforeſted, and be within any pariſh; then they ought to pay tithes in the hands of the king's leſſee. Boh. 163, 177, Gibs. Cod. 680.

It hath been queſtioned, where a park hath paid a modus, and is diſparked, whether the modus ſhall continue, or be diſcharged, and tithes paid in kind; and all the books are clear, that if the modus was a certain conſideration in money for all the tithes of ſuch a park, ſuch modus ſhall hold, notwithſtanding it be diſparked; but if the

the modus was, for the deer and herbage of ſuch a park, the modus is gone, upon diſparking. Gibs. 684. Wats. c. 47.

In like manner, if the modus hath been to pay a buck and a doe for all the tithes of ſuch a park, and the park is diſparked, the modus ſhall continue, and the owner may give a buck and a doe out of another park: but if it was, to pay the ſhoulder of every deer, or expreſsly a buck or a doe out of the ſame park, the modus is gone. Gibs. 684. Wats. c. 47.

But where the modus was, part in money, and part in veniſon out of the park (namely, two ſhillings and the ſhoulder of every (deer, the court was divided, two being of opinion, that the two ſhillings continued, and that the ſpiritual court ſhould aſſign an equitable recompence for the ſhoulders, according to the number that had been uſually paid; and the other two, that the money and veniſon making one entire modus, the one being gone, the whole was diſſolved. Gibs. 684. Wats. c. 47.

Ancient demeſnes.

It was held, that the king is not, by virtue of his prerogative, diſcharged of tithes for ancient demeſnes of the crown, but that as *perſona mixta* he is capable of a diſcharge *de non decimando* by preſcription, as well as a biſhop. But if the king alien any of the lands for which he is ſo diſcharged of tithes, his patentee ſhall pay tithes; and not only ſo, but the preſcription is deſtroyed for ever, altho' the ſame lands ſhould afterwards come into the king's hands again, by eſcheat or otherwiſe. Hardr. 315. Mich. 14. Car. 2.

Barren land.

By the ſtatute of 2 and 3 Ed. 6. c. 13. Sect 5. All ſuch barren, heath, or waſte ground, other than ſuch as be diſcharged from the payment of tithes by act of parliament, which before this time have lain barren, and paid no tithes by reaſon of the ſame barrenneſs, and now be or hereafter ſhall

ſhall be improved and converted into arable ground or meadow, ſhall after the end and term of ſeven years next after ſuch improvement fully ended and determined, pay tithe for the corn and hay growing upon the ſame.

Sect. 6. Provided, that if any ſuch barren, waſte, or heath ground, hath before this time been charged with the payment of any tithes, and the ſame be hereafter improved or converted into arable ground or meadow; the owner thereof ſhall, during the ſeven years next after the ſaid improvement, pay ſuch kind of tithe as was paid for the ſame before the ſaid improvement.

Barren.] Altho' it doth yield ſome fruit, and do pay tithes for wool and lamb, or the like, yet if it be barren land, as to agriculture or tillage, which this clauſe meant to advance, it is within this act. 2 Inſt. 656.

But yet if the ground be not apt for tillage, yet if it be not of its own nature barren, it is not within this act; as if a wood be ſtubbed and grubbed, and made fit for the plough, and employed thereunto; yet it ſhall pay tithes preſently; for woody ground is fertile and not barren. 2 Inſt. 656. Bunb. 159.

In the caſe of Stockwell and Terry, July, 14, 1748, it was held by lord Hardwicke, that ſuch land only is within this clauſe, as above the neceſſary expence of incloſing and clearing, as requires alſo expence in manuring before it can be made proper for agriculture; and he decreed tithe to be paid on its being proved, that the land bore better corn than the arable land in the pariſh, without any extraordinary expence of manure. 2. B. Ecc. L. 377.

Only ſuch land is intended *Barren* land, which before the ploughing produced no profit to the owner. Frem. Reports. 335. pl. 416. Mich. 1698. in Seau. Anon.—Bendl. 8. pl. 122. 2 Eliz. S. P. ſays,

ſays, that it is ſo underſtood by the opinion and judgment of the common law.—S. C. cited D. 170. b Marg. pl. 5.

By *waſte-ground*, is underſtood ſuch ground as no man claims for his own, or no man can tell to whom it certainly appertains, and lies unincloſed and unbounded with hedge or ditch; but ground that lies incloſed, and hedged and ditched, is ſo as the land is known, is not waſte ground. Bendl. 80. pl. 122. 2 Eliz. Anon.—S. C. cited D. 170. b. Marg. pl. 5.

By *heath ground* is intended, ſuch ground as is diſperſed and lies in common. Bendl, 80. pl. 122. 2. Eliz. Anon.—S. C. cited D. 170. b. Marg. pl. 5.

A ſuit was in the eccleſiaſtical court *for tithes of wheat and rye on ſixty acres of land.* The defendant moved for a prohibition, ſuggeſting, that the lands were barren heath and waſte grounds. *It was found by verdict that it was barren, but that of thirty acres of it tithe of wool and lambs had been paid.* And becauſe by another proviſo in the ſtatute, viz. That ſuch tithes as were paid before ſhould be paid within ſeven years after the improvement, &c. and not any tithes of another nature, and becauſe the libel was not for other tithes than for wheat and rye, *the party could not have a conſultation, but* they told him that *he might commence a new ſuit in the eccleſiaſtical court for tithes of wool and lamb in the thirty acres not improved.* D. 170. b. pl. 5. 171. a. pl. 6. Mich. 1 and 2. Eliz. Pells v. Sanderſon.

If land be full of *thorns and buſhes* from time whereof, &c. and it is grubbed up and made meadow or arable land, tithes ſhall be preſently paid thereof, notwithſtanding the 2 and 3 Ed. 6. 13. For thoſe lands were not *naturally barren*, but became ſo by negligence or ill huſbandry, and the ſtatute intends only barren land made good by

by induſtry. Cro. E. 475. pl. 3. Trin. 38 Eliz. B. R. in caſe of Shorington v. Fleetwood.

Fenny land drained is not exempted by the act. Mo. 430. pl. 603.

Land which has *broom* is not within the ſtatute of 2 Ed. 6. for it is not barren land, and therefore if converted into arable ſhall pay tithe; per Coke Ch. Jus. Roll. Rep. 39. Trin. 12 Jac. B. R.

If a man, at a great expence, *gains land from the ſea, which was marſh and ſandy land, and covered with ſalt water, and* afterwards *converts it into arable* land he ſhall pay tithes preſently, becauſe this land is not barren of its own nature, but only by accident, by reaſon of the ſand and ſalt-water overflowing it; agreed per Cur. clearly. 3 Bulſt. 156. Paſch. 14 Jac. Witt v. Buck.

If ſheep were kept on barren land, or if yielded any profit which yieldeth tithes, this *tithe* ought to be paid within the ſeven years; per Richardſon Ch. J. Litt. Rep. 311. Mich. 5 Car. C. B. Flower. v. Vaughan.

In an action on the ſtatute 2 Ed. 6. the caſe was, an incloſure was part of the waſte, and it was turned into a paſture, and held, that tho' it was of ſmall value, viz. 2. ſ. per Ann. and never ſown or turned into meadow, yet it ſhall pay tithes, and the very *incloſure is an improvement*, and it is no waſte ground within the ſtatute to be freed from *tithes* for a time, &c. Clayt. 127. pl. 226. March. 1647. Anon.

Barren lands to be exempted from tithes within the meaning of 2 Ed. 6. muſt be ſuch land as is *Barran Suapte Natura*; and on ſuggeſtion for a prohibition to a ſuit for tithes of ſuch land, it muſt be *alledged* to be barren *Suapte Natura*; per Powell J. 2 Lord Raym. 991. Trin 2 Ann. Anon.

Prohibition for ſuing for tithes *of barren lands newly cultivated* was denied, firſt, becauſe the *plaintiff did not ſuggeſt that they were Suapte Natura Steriles.*

Steriles; ſecondly, becauſe there *was no affidavit that this was pleaded in the ſpiritual court.* 6 Mod. 86. Mich. 2. Ann. B. R. Anon.

In the caſe of Lambert and Cumming, Mich. 1723; on a bill for tithes in the pariſh of Warton in the county of Lancaſter, it was decreed, that an exemption of an eſtate from tithes ſhall extend to a common appurtenant to ſuch eſtate. Bunb. 138.

But in the caſe of a modus, or cuſtomary payment in lieu of tithes, it ſeemeth, that where commons are divided, incloſed, and improved, the modus can only extend to ſuch tithes as the common yielded before its improvement and diviſion into ſeveralties; as of the agiſtment of cattle, wool and lamb, or ſuch like; and not to the tithes of corn, hay or other tithes accruing, *de novo*, after the improvement. But where there is a modus in lieu of *all* the tithes of ſuch an eſtate, it ſeemeth that ſuch modus ſhall cover the common appurtenant to ſuch eſtate when divided into ſeveralties and incloſed: as in the caſe of Stockwell and Terry, July 14, 1748, it was held by lord Hardwicke, where a modus of 13l. was paid for Grange farm, to which there was common appurtenant, a parcel of which common was allotted to the ſaid farm under an act of parliament for incloſing the ſaid common, that the modus extended to ſuch new incloſed land. 2 B. Ecc. L. 388.

In a prohibition between Sharington and Fleetwood, H. 38 Eliz. for tithes in Orwell in the county of Lancaſter, it was reſolved, that if marſh, meadow or other land, for not cleanſing of the trenches or ſewers, or by ſudden accident, or inundation of waters, be ſurrounded; or by ill huſbandry or unprofitable negligence, any land become over-run with buſhes, furze, whins, and briars; yet are not they or any of them ſaid to be barren land within this ſtatute, becauſe of their

own nature they are fruitful; and the parſon ſhall not by this act be barred of his tithe, by the ill huſbandry or negligence of the owner or poſſeſſor. 2 *Inſt.* 656.

Note, that though in the Stat. 2 3 Ed. 6. c. 13. Sect. 6. there are no expreſs words of diſcharge of the tithes during the ſeven years; yet by reaſonable conſtruction it doth impliedly amount to a diſcharge during the ſeven years: and the ſeven years are to be accounted next after the improvement. 2 Inſt. 656.

The trial whether lands are barren or not within the ſtatute, muſt be in the temporal, and not in the ſpiritual court, and therefore in a ſuit for tithes in the ſpiritual court, if the defendant plead that it is barren land, and that plea be refuſed, or iſſue taken upon it, there a prohibition ſhall be granted; but a prohibition ſhall not be granted upon a ſuggeſtion only that it is barren land, before it be pleaded in the ſpiritual court. Degg. p. 2. c. 19. 1 Keb. 253.

Glebe land. Glebe is a portion of land, meadow or paſture, belonging to, or parcel of, the parſonage or vicarage, over and above the tithes. Godol. Rep. 409.

As long as the vicar occupies the glebe land in his own hands, he ſhall pay no tithes. But if he leaſes it to another, the leſſee ſhall pay tithes to the parſon that is impropriate. Brown. 69.

Glebe lands, if in the hands of the parſon, ſhall not pay tithe to the vicar, tho' endowed generally of the tithes of all lands within the pariſh; nor, being in the hands of the vicar, ſhall they pay tithe to the parſon: and this is according to the known maxim of the canon law, that the church ſhall not pay tithes to the church. But if the vicar be ſpecially endowed of the ſmall tithes of the glebe lands of the parſonage; then he ſhall have

have them, tho' they are in the hands of the appropriator. Gibs. 661. Deg. p. 2 c. 2.

If a parſon leaſe his glebe lands, and do not alſo grant the tithes thereof, the tenant ſhall pay the tithes thereof to the parſon. Deg. p. 2. c. 2. 1 Roll. Abr. 655.

And if a perſon lets his rectory, reſerving the glebe lands, he ſhall pay the tithes thereof to his leſſee. Gibs. 661.

If a parſon ſow his glebe, and dieth before the ſeverance, and afterwards his ſucceſſor is inducted, and his executor or vendee ſevereth the corn; the ſucceſſor ſhall have the tithe thereof; for altho' the executor repreſent the perſon of the teſtator, yet he cannot repreſent him as parſon, inaſmuch as another is inducted. 1 Roll. Abr. 655.

Otherwiſe, if the parſon dieth after ſeverance from the ground, and before the corn is carried off; in this caſe, the ſucceſſor ſhall have no tithe; becauſe, tho' it was not ſet out, yet a right to it was veſted in the deceaſed parſon by the ſeverance from the ground. The ſame is true in caſe of deprivation, or reſignation, after glebe ſown: the ſucceſſor ſhall have the tithe, if the corn was not ſevered at the time of his coming in; otherwiſe, if ſevered. Gibs. 662.

Abbey land.

All abbots and priors, and other chief monks originally paid tithes as well as other men, until Pope Paſchal the Second exempted generally all the religious from paying tithes of lands in their own hands; and this continued as a general diſcharge, till the time of king Henry the Second, when Pope Hadrian the Fourth reſtrained this exemption to the then religious orders only of Ciſtercians, Templars, and Hoſpitalers; unto which Pope Innocent the Third added a Fourth, to wit, the Premonſtratenſes, and this made up the four orders, which are commonly called the Privileged Orders; for that they claimed a privelige to be diſ-

charged of tithes by the popes eſtabliſhment. See Gibs. Cod. 671.

Then came the general council of Lateran, in the year 1215, and further reſtrained the ſaid exemption from tithes of lands in their own occupation, to thoſe lands which they were in poſſeſſion of before that council. But the Ciſtercians, in proceſs of time, did procure bulls to exempt alſo their lands which were letten to farm; for the reſtraining of which practice, the ſtatute of the 2 H. 4. c. 4. was made, by which it was enacted, that as well they of the ſaid order, as all other religious and ſeculars, which ſhould put the ſaid bulls in execution, or from thenceforth ſhould purchaſe other ſuch bulls, or by colour thereof ſhould take advantage in any manner, ſhould incur a præmunire. So that this ſtatute reſtrain'd them from purchaſing any ſuch exemptions for the future; and as to the reſt, left their privileges as they were before the ſaid ſtatute, that is to ſay, under a limitation to ſuch lands only as they had before the Lateran council aforeſaid; and it is certain they obtained many lands after that council, which therefore were in no wiſe exempted: and alſo the ſaid ſtatute left them, as it found them, ſubject to the payment of divers compoſitions for tithes of their demeſne lands, made with particular rectors; who conteſting their privileges, even under that head, brought them to compound. Theſe two reſtraints were alſo followed by a third, at the time of the diſſolution; when as many of them as did not fall under the ſtatute of the 31 H. 8, c. 13. loſt their exemptions, there being no ſaving clauſe in the acts of their diſſolution, or ſurrender, to preſerve or to revive them.

But as to thoſe which were diſſolved by the ſtat. 31 H. 8, c. 13, ſect. 21. it is enacted as followeth: viz. "Where divers abbots, priors, and other eccleſiaſtical governors of the monaſteries, abbathies,

abbathies, priories, nunneries, colleges, hoſpitals, houſes of friars, and other religious and eccleſiaſtical houſes and places diſſolved by this act, have had divers parſonages appropriated, tithes, penſions and portions, and alſo were acquitted and diſcharged of the payment of tithes for their monaſteries or other religious and eccleſiaſtical houſes and places as aforeſaid, manors, meſſuages, lands, tenements and hereditaments; it is enacted, that as well the king our ſovereign lord, his heirs and ſucceſſors, as all other perſons, their heirs and aſſigns, who ſhall have any of the ſaid monaſteries, abbathies, priories, nunneries, colleges, hoſpitals, houſes of friars, or other eccleſiaſtical houſes or places, ſites, circuits, precincts of the ſame or any of them, or any manors, meſſuages, parſonages appropriate, tithes, penſions, portions or other hereditaments, which belonged to any ſuch religious houſe, ſhall hold and enjoy, as well the ſaid parſonages appropriate, tithes, penſions, and portions of the ſaid monaſteries, abbathies, priories, nunneries, colleges, hoſpitals, houſes of friars, and other religious and eccleſiaſtical houſes and places, ſites, circuits, precincts, manors, meſſuages, lands, tenements, and other hereditaments, according to their eſtates and titles, diſcharged and acquitted of payment of tithes, as freely, and in as large and ample manner as the ſaid late abbots, priors, and other eccleſiaſtical governors held and enjoyed the ſame." See Gibs Cod. 671, 672, 673.

By reaſon of which diſcharge from tithes of lands, which were given to the king by this act, and which were diſcharged in the hands of the religious, it hath been more ſtrictly enquired what were the houſes diſſolved by this act than by any other of the acts of diſſolution, which will beſt appear by the following catalogue:

Catalogue of monaſteries of the yearly value of 200*l.* or upwards, diſſolved by the ſtatute of the 31 H. 8. and by that means capable of being diſcharged of tithes: in which are the following abbreviations:

Ab. abbey; Pr. priory; C. Auſt. Canons of St. Auſtin; Bl. M. Black Monks; Wh. C. White Canons; Ben. Benedictines; Gilb. Gilbertines; Præm. Præmonſtratenſes; Carth. Carthuſians; Mon. Monks; Clun. Cluniacks; Ciſt. Ciſtercians; t. in the time of; ab. about the year.

BERKSHIRE.

Monasteries.	Order.	Founded.	Value. £.	s.	d.
READING.	Ben. —	T. Hen. 1.	1938	14	3
Buſleſham ab.	C. Auſt.	13 Ed. 3.	285	0	0
Abington ab.	Ben —	720 —	1876	10	9

BEDFORDSHIRE.

Newnham pr.	C. Auſt.	T. Hen. I.	293	15	11
Elmiſton ab.	Ben. —	T. W. Conq.	284	12	11
Wardon ab.	Ciſt. —	1139. —	389	16	6
Chickſand pr.	Wh.C.Gilb.	T. W. Rufus.	212	3	5
Dunſtable ab.	C. Auſt.	T. Hen. 1.	344	13	3
Wooburn ab.	Ciſt. —	T. John.	391	18	2

BUCKINGHAMSHIRE.

Aſhrugg coll.	C. Auſt.	T. Edw. 1.	416	16	4
Notely ab.	C. Auſt.	1112 —	437	6	8
Miſſenden ab.	Ben. —	1293 —	261	14	6

CAMBRIDGESHIRE.

Thorney ab.	Ben. —	972 —	411	12	11
Barewel pr.	C. Auſt.	1092 —	256	11	10

CHESHIRE.

St. Werburge ab.	Ben. —	1095 —	1093	5	11
Combermeer ab.	Ciſt. —	1134 —	225	9	7

CORN-

CORNWALL.

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Bodmin pr.	C. Auſt.	936. —	270	0	11
Launceſton ab.	C. Auſt.	T. W. Conq.	354	0	11
St. Germain's ab.	C. Auſt.	T. Ethelſtan.	243	8	0

CUMBERLAND.

Carliſle pr.	C. Auſt.	T. W. Rufus.	418	3	4
Holme Coltrom ab.	Ciſt. —	1135. —	427	19	3

DERBYSHIRE.

Darley ab.	C. Auſt.	T. H. 2.	258	14	5

DEVONSHIRE.

Ford ab.	Ciſt. —	1133. —	374	10	6
Newnham ab.	Ciſt. —	ab. 1246.	227	7	8
Dinkeſwel ab.	Ciſt. —	1201. —	294	18	6
Hertland ab.	C. Auſt.	T. H. 2.	306	3	2
Torre ab.	Præm.	T. Ric. 1.	396	0	11
Buckfaſt ab.	Ciſt. —	T. H. 2.	466	11	2
Plimpton ab.	Ciſt. —	T. Edw. 1.	241	17	9
Taviſtock ab.	Ben. —	961. —	902	5	7
Exon pr.	Clun. —	T. Hen. 1.	502	12	9

DORSETSHIRE.

Abbotſbury.	Ben. —	ab. 1016.	390	19	2
Middleton ab.	Ben. —	T. Ethelſtan.	538	13	11
Tarrent ab.	Ciſt. —	By Hen. 3.	214	7	9
Shafton ab.	Ben. —	941. —	1166	8	9
Cerne ab.	Ben. —	T. Edgar.	515	17	10
Sherburn ab.	Ben. —	ab. 370. —	682	14	7

DURHAM.

S. Cuthbert ab.	Ben. —	ab. 842.	1366	10	9
Tinmouth pr.	Ben. —	— — —	397	11	5

ESSEX.

Berking ab.	Ben. —	680. —	862	12	5
Stratford Langthorn ab.	Ciſt. —	1135. —	511	16	3
Waltham ab.	C. Auſt.	ab. 1060.	900	4	3

Monasteries.	Order.	Founded.	Value. £. s. d.
Walden ab.	Ben. —	1136. —	372 18 1
St. Oſwith ab.	C. Auſt.	1120 —	677 1 2
Colcheſter ab.	C. Auſt.	T. Hen. 1.	523 17 0
GLOUCESTERSHIRE.			
Briſtol ab.	C. Auſt.	T. Hen. 1.	670 13 11
Hayles ab.	Ciſt. —	1246. —	357 7 8
Winchcomb ab.	Ben. —	787. —	759 11 9
Tewkeſbury ab.	Ben. —	715. —	1598 1 5
Cirenceſter ab.	C. Auſt.	T. Hen. 1.	1051 7 1
King's-wood ab.	Ciſt. —	1139. —	244 11 2
Glouceſter ab.	Ben. —	680. —	1946 5 9
Lanthony pr.	C. Auſt.	1136. —	641 19 11
HAMPSHIRE.			
St. Swithins Winton ab. — —	Ben. —	634. —	1507 17 2
Hyde ab.	Ben. —	by Alfred.	865 18 0
Wherwell ab.	Ben. —	by Edgar.	339 8 7
Romſey mon.	Ben. —	907. —	393 10 10
Twinham pr.	C. Auſt.	before 1042.	312 7 0
Belloloco ab.	Ciſt. —	1024. —	326 13 2
Southwick pr.	C. Auſt.	T. H. 1.	257 4 4
Tichfield ab.	Præm.	T. H. 3.	249 16 1
HERTFORDSHIRE.			
St. Albans ab.	Ben. —	755. —	2102 7 1
HUNTINGDONSHIRE.			
St. Neots ab.	Ben. —	ab. T. Hen. 1.	241 11 4
Ramſey ab.	Ben. —	969. —	1716 12 4
KENT.			
St. Auſtins Cant.	Ben. —	605. —	1413 4 11
Ledis pr.	C. Auſt.	1119. —	362 7 7
Feverſham ab.	Clun. —	1147.	286 12 6
Boxley ab.	Ciſt. —	1144. —	204 4 11
Roffen ab.	Ben. —	600. —	486 11 5
Mallin ab.	Ben. —	by Edmund.	218 4 2
Dartford ab.	C. Auſt.	1372. —	380 0 0

LANCASHIRE.

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Whalley ab.	Ciſt. —	1172. —	321	9	1

LEICESTERSHIRE.

Leiceſter ab.	C. Auſt.	1143. —	951	14	5
Croxden ab.	Præm.	ab. R. 1.	385	0	10
Launda ab.	C. Auſt.	T. W. Rufus.	399	3	3

LINCOLNSHIRE.

Lincoln St. Cath pr.	Gilb. —	T. Hen. 2.	202	5	0
Kirkſteed ab.	Ciſt. —	1139. —	286	2	7
Reveſly ab.	Ciſt. —	1142. —	287	2	4
Thorton ab.	C. Auſt.	1139. —	594	17	10
Barney ab.	Ben. —	712. —	366	6	1
Croyland ab.	Ben. —	716. —	1803	15	10
Splading ab.	Ben. —	1052. —	761	8	11
Sempringham ab.	Gilb. —	1148. —	317	4	1
Epworth mon.	Carth. —	1386. —	237	15	2

LONDON AND MIDDLESEX.

St. John Jeruſalem pr.	— — —	1100.	2385	12	8
St. Barth Smithfied.	C. Auſt.	1102. —	653	15	0
St. Mary Biſhopſgatepr.	— — —	1187. —	478	6	6
Clerkenwell pr.	Ben. —	T. Stephen.	262	19	0
London minors.	Ben. —	T. Edw. 1.	318	8	5
Weſtminſter ab.	Ben. —	T. Edgar.	3471	0	2
Sion ab.	C. Auſt.	by Hen. 5.	1731	8	4
London a houſe of	Carth. —	T. Ed. 3.	642	0	4
St. Clare without Aldgate mon.	— — —	1292. —	418	8	5
St. Mary charterhouſe.	Carth. —	1379. —	736	2	7
St. John Holiwell.	Bl. M. —	1318. —	347	1	3
St. Mary Eaſt Smithfield. ab.	Ciſt. —	1360. —	602	11	10

NORFOLK.

Thetford ab.	Clun. —	1103. —	312	14	4
Wymundham ab.	Ben. —	1139. —	211	16	6
Hulmo ab.	Ben. —	by Canute.	583	17	0
Weſtderham ab.	Præm. —	T. Hen. 2.	228	0	0

Walſingham

Monasteries.	Order.	Founded.	Value. £. s. d.
Walden ab.	Ben. —	1136. —	372 18 1
St. Oſwith ab.	C. Auſt.	1120 —	677 1 2
Colcheſter ab.	C. Auſt.	T. Hen. 1.	523 17 0
GLOUCESTERSHIRE.			
Briſtol ab.	C. Auſt.	T. Hen. 1.	670 13 11
Hayles ab.	Ciſt. —	1246. —	357 7 8
Winchcomb ab.	Ben. —	787. —	759 11 9
Tewkeſbury ab.	Ben. —	715. —	1598 1 5
Cirenceſter ab.	C. Auſt.	T. Hen. 1.	1051 7 1
King's-wood ab.	Ciſt. —	1139. —	244 11 2
Glouceſter ab.	Ben. —	680. —	1946 5 9
Lanthony pr.	C. Auſt.	1136. —	641 19 11
HAMPSHIRE.			
St. Swithins Winton ab. — —	Ben. —	634. —	1507 17 2
Hyde ab.	Ben. —	by Alfred.	865 18 0
Wherwell ab.	Ben. —	by Edgar.	339 8 7
Romſey mon.	Ben. —	907. —	393 10 10
Twinham pr.	C. Auſt.	before 1042.	312 7 0
Belloloco ab.	Ciſt. —	1024. —	326 13 2
Southwick pr.	C. Auſt.	T. H. 1.	257 4 4
Tichfield ab.	Præm.	T. H. 3.	249 16 1
HERTFORDSHIRE.			
St. Albans ab.	Ben. —	755. —	2102 7 1
HUNTINGDONSHIRE.			
St. Neots ab.	Ben. —	ab. T. Hen. 1.	241 11 4
Ramſey ab.	Ben. —	969. —	1716 12 4
KENT.			
St. Auſtins Cant.	Ben. —	605. —	1413 4 11
Ledis pr.	C. Auſt.	1119. —	362 7 7
Feverſham ab.	Clun. —	1147.	286 12 6
Boxley ab.	Ciſt. —	1144. —	204 4 11
Roffen ab.	Ben. —	600. —	486 11 5
Mallin ab.	Ben. —	by Edmund.	218 4 2
Dartford ab.	C. Auſt.	1372. —	380 0 0

LANCASHIRE.

Monasterries.	Order.	Founded.	Value. £.	s.	d.
Whalley ab.	Ciſt. —	1172. —	321	9	1

LIECESTERSHIRE.

Leiceſter ab.	C. Auſt.	1143. —	951	14	5
Croxden ab.	Præm.	ab. R. 1.	385	0	10
Launda ab.	C. Auſt.	T. W. Rufus.	399	3	3

LINCOLNSHIRE.

Lincoln St. Cath pr.	Gilb. —	T. Hen. 2.	202	5	0
Kirkſteed ab.	Ciſt. —	1139. —	286	2	7
Reveſly ab.	Ciſt. —	1142. —	287	2	4
Thorton ab.	C. Auſt.	1139. —	594	17	10
Barney ab.	Ben. —	712. —	366	6	1
Croyland ab.	Ben. —	716. —	1803	15	10
Splading ab.	Ben. —	1052. —	761	8	11
Sempringham ab.	Gilb. —	1148. —	317	4	1
Epworth mon.	Carth. —	1386. —	237	15	2

LONDON AND MIDDLESEX.

St. John Jeruſalem pr.	— — —	1100.	2385	12	8
St. Barth Smithfied.	C. Auſt.	1102. —	653	15	0
St. Mary Biſhopſgatepr.	— — —	1187. —	478	6	6
Clerkenwell pr.	Ben. —	T. Stephen.	262	19	0
London minors.	Ben. —	T. Edw. 1.	318	8	5
Weſtminſter ab.	Ben. —	T. Edgar.	3471	0	2
Sion ab.	C. Auſt.	by Hen. 5.	1731	8	4
London a houſe of	Carth. —	T. Ed. 3.	642	0	4
St. Clare without Aldgate mon.	— — —	1292. —	418	8	5
St. Mary charterhouſe.	Carth. —	1379. —	736	2	7
St. John Holiwell.	Bl. M. —	1318. —	347	1	3
St. Mary Eaſt Smithfield. ab.	Ciſt. —	1360. —	602	11	10

NORFOLK.

Thetford ab.	Clun. —	1103. —	312	14	4
Wymundham ab.	Ben. —	1139. —	211	16	6
Hulmo ab.	Ben. —	by Canute.	583	17	0
Weſtderham ab.	Præm. —	T. Hen. 2.	228	0	0

Walſingham

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Walſingham ab.	C. Auſt.	ab T. Stephen.	391	11	6
Caſtle acre ab.	Clun. —	1090. —	306	11	4
Weſt acre ab.	Clun. —	T. W. Rufus.	260	13	7
NORTHAMPTONSHIRE.					
Burg. St. Peter ab.	Ben. —	by Roſcre k. of Mercia.	1721	14	0
Pipewell ab.	Ciſt. —	1143. —	286	11	8
St. Andrews pr.	Clun. —	1067. —	263	7	1
Sulby ab.	Præm. —	T. Stephen.	258	8	5
NOTTINGHAMSHIRE.					
Lenton pr.	Clun. —	T. Hen. 1.	329	5	10
Thurgarton pr.	C. Auſt.	T. Hen. 1.	259	9	4
Welbeck ab.	C. Auſt.	T. Stephen.	249	6	3
Warſop pr.	C. Auſt.	— — —	239	10	5
Bella Valla pr.	Carth. —	ab. 16. Ed. 3.	227	8	0
Newſtead pr.	C. Auſt.	T. Edw. 3.	219	18	8

The two laſt are under value in Dugdale, but thus by Speed.

NORTHUMBERLAND.					
Tinmouth, a cell to St. Albans, a nunnery.			511	4	1
OXFORDSHIRE.					
Godſtow ab.	Ben. —	T. Stephen.	274	5	10
Eyneſham ab.	Ben. —	by Ethelred.	441	12	2
Oſney ab.	C. Auſt.	T. Hen. 1.	654	10	2
Thame ab.	Ciſt. —	T. Hen. 1.	256	13	11
Oxford pr.	— — —	before Conq.	224	4	8
Dorcheſter ab.	C. Auſt.	635. —	219	12	0
SHROPSHIRE.					
Haghmond ab.	C. Auſt.	1100. —	259	13	7
Lilleſhull ab.	C. Auſt.	by Elfleda k. of Mercia.	229	3	1
Wigmore ab.	C. Auſt.	1172. —	267	2	10
Wenlock pr.	Clun. —	1181. or before	401	0	7
Salop ab.	C. Auſt.	1081. —	615	4	3
Hales Owen ab.	Præm. —	T. John.	337	15	6

SOMMERSETSHIRE.

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Glaſſenbury ab.	Ben. —	about 300.	3311	7	4
Brewton ab.	C. Auſt.	ab. T. Conq.	439	6	8
Henton pr.	Carth. —	T. Hen. 3.	248	19	2
Witham pr.	Carth. —	by Hen 2.	215	15	0
Taunton pr.	C. Auſt.	T. Hen. 1.	286	8	10
Bath pr.	Ben. —	T. Hen. 3.	617	2	3
Keyneſham ab.	C. Auſt.	T. Hen 1.	419	14	3
Michelney ab.	Ben. —	740. —	447	4	11
Buckland pr.	Ciſt. —	T. Edw. 1.	223	7	4

STAFFORDSHIRE.

Dela Cres ab.	Ciſt. —	1153. —	227	5	0
Burton upon Trent.	Ben. —	T. Eadred.	267	14	3
Croxden ab.	Ciſt. —	— — —	—	—	—

SUFFOLK.

St. Edmunſbury ab.	Ben. —	1020. —	1659	13	11
Butley ab.	C. Auſt.	1171. —	318	17	2
Sibeton ab.	Ciſt. —	1150. —	250	15	7
Ixworth pr.	C. Auſt.	T. W. Conq.	280	9	5

SURREY.

Merton pr.	C. Auſt.	1414. —	957	19	5
Shene pr.	Carth. —	1414. —	777	12	0
Chertſey ab.	Ben. —	666. —	659	15	8
Newark pr.	— — —	— — —	258	11	11
St. Maryovers ab.	C. Auſt.	1106. ——	625	6	6
Bermundſey ab.	C. Auſt.	1106. ——	474	14	4

SUSSEX.

Lewes ab.	Clun. —	T. W. Ruf.	920	4	6
Roberts bridge ab.	Ciſt. ——	T. Hen. 2.	248	10	6
Battaille ab.	Bl. M. —	1066 ——	987	0	11

WARWICKSHIRE.

Combe ab.	Ciſt. ——	T. Steph.	311	15	1
Kenelworth ab.	C. Auſt.	T. Hen 1.	538	19	0
Meryval ab.	Ciſt. ——	1148. ——	254	1	8
Nuneaton mon.	Ben. ——	T. Hen 2.	253	14	5

WILTSHIRE.

Malmſbury ab.	Ben. ——	ab. 670.	803	17	7
Bradenſtock pr.	C. Auſt.	T. W. Conq.	212	19	3
Edington pr.	C. Auſt.	1352. ——	442	19	7
Ambreſbury ab.	Ben. ——	1177. ——	494	15	2

Wilton

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Wilton ab.	Ben. ——	T. Ethelwolf.	601	1	1
Fairly, a cell to Lewes.	Clun. ——	1125. ——	217	0	4
Laycock ab.	C. Auſt.	1232. ——	203	12	3
WORCESTERSHIRE.					
Malverne ab.	Ben. ——	1083. ——	308	1	3
Eveſham ab.	Ben. ——	T. Offa.	1183	12	9
Perſhore ab.	Ciſt. —	—— ——	643	4	5
Hales Oowen ab.	Præm. —	T. John.	282	13	4
Bordeſly ab.	Ciſt. —	1138. ——	388	1	1
YORKSHIRE.					
St. Mary York ab.	Ben. ——	1088. ——	1550	7	0
Selby ab.	Ben. ——	T. W. Conq.	720	12	10
Kirkſtal ab.	Ciſt. ——	1147. ——	329	2	11
De Rupe ab.	Ciſt. ——	1147. ——	224	2	5
Monks Burton ab.	Clun. ——	ab. 1186.	239	3	6
Noſtel ab.	C. Auſt.	T. Hen. 1.	492	18	2
Pomfrait ab.	Clun. ——	T. W. Conq.	237	14	8
Giſbourn ab.	C. Auſt.	T. Steph.	628	3	4
Whitby ab.	Ben. ——	T. W. Conq.	437	2	9
Montegratia ab.	Carth.	ab. 1396.	323	2	10
Newburge pr.	C. Auſt.	1145. ——	367	8	3
Belland ab.	Ciſt. ——	1134 ——	238	9	4
Kirkham ab.	C. Auſt.	T. Hen. 1.	269	5	9
Melſa ab.	Ciſt. ——	1136 ——	299	6	4
Brilington.	C. Auſt.	T. Hen. 1.	547	6	11
Walton ab.	Gilb. ——	T. Stephen.	360	16	10
Bolton in Craven pr.	C. Auſt.	T. Hen. 1.	212	3	4
Rival ab.	Ciſt. ——	1132. ——	278	10	2
Jerval ab.	Ciſt. ——	T. Stephen.	234	18	5
Furnes ab.	Ciſt. ——	1127 ——	805	16	5
De Fontibus.	Ciſt. ——	1132. ——	998	6	8
Warter. pr.	C. Auſt.	T. Hen. 1.	221	3	10
Richal.	—— ——	—— ——	351	14	6
Old Maulton ab.	—— ——	T. Stephen.	257	7	0
St. Michael near Hull.	Carth.	1377. ——	231	17	3
IN WALES.					
Valle de Sancta Cruce in Denbeighſhire.	Ciſt. ——	T. Edw. 1.	214	3	5
Strata Florida, in Cardiganſhire.	Ciſt or clun.	T. W. Conq.	1226	6	0

CHAP. III.

Of Exemptions from payment of Tithes; and of Modus, Cuſtom, and Preſcription.

THERE are five ways or means whereby abbey-lands are holden diſcharged of tithes, that is to ſay, *compoſition*, *bull or canon*, *order*, *preſcription of diſcharge*, and *unity of poſſeſſion of parſonage and land*, *time out of mind*, together with payment of tithe; and of theſe five, the four firſt diſcharges the abbots themſelves had, or might have them, but the fifth was no diſcharge in the hands of the abbeys, but it made a diſcharge of payment of tithes to the king, and thoſe that claim under him by the favourable conſtruction of that clauſe of 31 H. 8. (See page 20.) for ſo much as that clauſe extends to; which opinion was long controverted, being confeſſed of all hands, that it was no full and perfect diſcharge in law. Means of being exempted from payment of tithes.

Now of the other four, the firſt three, that is, compoſition, bull or canon, and order, were granted and affixed unto the body of the monaſtery, and were granted unto them as *perſonal privileges*, in reſpect of their ſpiritual abilities or functions, and their capacity of tithes, and diſcharge of tithes for that cauſe; and therefore theſe had all vaniſhed and expired with the diſſolution of the body, if they had not been preſerved to the king and his patentees by that clauſe. But diſcharges of tithes of the lands of monaſteries by preſcription, is of another nature; for having been always (as preſcription preſumes) in ſpiritual hands, the law judges that it was never charged with tithe; as the pleading is, that the lands were *immunes a ſolutione decimarum negative*, *non privative*, ſcilicet, *undiſcharged*, *not diſcharged*, as

as if they had been once chargeable; the reaſon whereof was, that being ſpiritual perſons they were able to miniſter to themſelves ſpiritual rites, and therefore performing *officium*, they might retain *beneficium*; and this noncharge ſtanding upon preſcription, was inherent to the land, not as a thing given, but as a *non ens*, lands that never yielded tithe; and land of the little monaſteries ſo free of tithes, the king by the ſtatute 27 H. 8. and his patentees, were to hold free, not by reaſon of any privilege which did need to be preſerved by any ſtatute, but ever by the grant of the land by any kind of conveyance. And therefore, tho' I have ſaid that diſcharge of bull, or compoſitition, was to die with the corporation, yet if it were once run out time out of mind, it was then to be pleaded and uſed as a *non charge* by preſcription, which was a title of diſcharge by the temporal law; and if it were impugned, it were to be drawn, by prohibition, to a trial at the common law, and this without the help of any ſtatute. And therefore, in the biſhop of Wincheſter's caſe it was reſolved; that the biſhop holding lands of his biſhoprick, diſcharged of tithes by preſcription, his farmer being a layman, ſhall have a prohibition for his diſcharge; and ſo ſhall the biſhop have himſelf, though he be a ſpiritual perſon. And yet biſhoprics, and their lands, are in point of diſcharge of tithes at the common law, out of all ſtatutes; ſo then the concluſion is, that of the five ways of diſcharge of tithes, three, that is to ſay, *order*, *compoſition*, *bull or canon*, are preſerved and kept alive by the clauſe of diſcharge in the ſtatute of 31 H. 8. and a fourth, which is *unity*, is created by that branch; and the fifth, which is *preſcription*, ſtands by the common law, and has no need nor uſe of any ſtatute; per Hobart Ch. J. Hob. 309. Hill. 15 Jac. in caſe of Wright, v. Gerrard and Hilderſham.

But

But though by ſuch unity of poſſeſſion, the perſons ſo poſſeſſed were diſcharged from the payment of tithes, yet the lands were not abſolutely diſcharged of the tithes; for upon any diſunion that might happen, the payment of tithes again revived; ſo that the union only ſuſpended the payment, but was no abſolute diſcharge of the tithes themſelves. And therefore ſuch union is not to be pleaded as a diſcharge from tithes, but only as a diſcharge from the payment of tithes. See Hob. 44, 297.

And ſuch union muſt appear to have had theſe four qualities: firſt, it muſt have been *juſt*, that is, claimed by right, and good and lawful title; and not by diſſeiſin, or other tortious, unjuſt, or unlawful act: for ſuch an union would not have been a good diſcharge within the ſtatute. Secondly, it muſt have been *equal*; that is, there muſt have been a fee ſimple, both in the lands and in the tithes, as well of the lands upon which the tithes are, as of the parſonage or rectory: for if thoſe religious perſons had held but by leaſe, that had not been ſuch a unity as the ſtatute intended. Thirdly, it muſt have been *free*, that is, free from the payment of any tithes, in any manner: for if the abbots, or their farmers, or their tenants at will, or for years, had paid any manner of tithes before the diſſolution, it may be alledged as a ſufficient bar to avoid the unity pleaded in diſcharge of tithes. Fourthly, it muſt have been *perpetual*, time out of mind, that ſuch religious houſes were endowed, and ſuch religious perſons muſt have had in their hands both the rectory and the lands united, perpetually, and without interruption, before the memory of man, or (as it ſeems according to the rule of the common law) before the firſt year of king Richard the Firſt, diſcharged of tithes; for if by any records, or antient deeds, or other legal evidence, it can be made to appear that either the lands or the rectory,

tory, came to the abbey, ſince the ſaid firſt year of king Richard the Firſt, ſuch union cannot be ſaid to be perpetual. See Hob. 298, 306, 311. Moor 46, 47, 528. Dyer 349. Cro. Jac. 608. 2 Inſt. 655.

And moreover the lands of ſuch houſes diſſolved as aforeſaid, ſhall be free from the payment of tithes, only ſo far as they were free in the hands of the churchmen, namely, whilſt they are in the hands and manurance of the owners thereof, and therefore it is neceſſary for the party who would have the advantage of this privilege, expreſly to ſhew and aver that the lands are in his hands and manurance, for to ſay that he is ſeiſed of the lands is not ſufficient, for he may be ſeiſed thereof, and yet another manure them. Comyns rep. 498. Wood, b. 2. c. 2.

It hath been held alſo, that a tenant in tail, who hath an eſtate of inheritance, ſhall be diſcharged in virtue of the clauſe aforeſaid, ſo long as he occupies the ſame himſelf; but that unity of poſſeſſion doth not diſcharge a copyholder (though a prior in that caſe was ſeiſed in fee of the manor of which it was a parcel, and was alſo impropriator); much leſs a tenant for life of years. Gibs. 673.

But it is otherwiſe with regard to the king; whoſe farmers ſhall be diſcharged of ſuch tithes, as the ſpiritual perſons were, becauſe the king cannot cultivate the lands himſelf. And ſo long as the king hath the freehold, his farmers ſhall have ſuch privilege; but if after having leaſed them, he ſhall ſell the ſame, or ſhall grant over the reverſion, then the farmers ſhall pay tithes. And it hath been ſaid that this privilege extends no further than to the kings tenants at will, not to tenants for life or years. Gibs. 673.

Difference between cuſtom and preſcription.

The difference between cuſtom and preſcription is this: *cuſtom* is that which gives right to a province, county, hundred, city, or town, and is common

common to all within the reſpective limits; in pleading of which, it is alledged, that in ſuch a county, or the like, there is, and time out of memory hath been, ſuch a cuſtom uſed and approved therein. Gibs. 674.

Preſcription is that which gives a right to ſome particular houſe, farm, or other thing; in pleading of which it is alledged, that all they whoſe eſtate he hath in ſuch land, have time out of mind, paid ſo much yearly, or the like, in full ſatisfaction of all tithes ariſing on thoſe lands. Gibs. 674.

Cuſtom and preſcription are either, *de non decimando*, or *de modo decimandi*. *De non decimando*, is to be free from the payment of tithes, without any recompence for the ſame. Concerning which, the general rule is, that no layman can preſcribe in *non decimando*, that is, to be diſcharged abſolutely of the payment of tithes, and to pay nothing in lieu thereof; unleſs he begin in his preſcription in a religious or eccleſiaſtical perſon, and derive a title to it by act of parliament. But all ſpiritual and religious perſons, as biſhops, deans, prebends, parſons, vicars (as heretofore abbots and priors), may preſcribe generally in *non decimando*, for they are more favoured than lay perſons; for this is ſtill in a ſpiritual perſon, and ſo nothing is taken from the church; for ſuch ſpiritual perſon was capable of a grant of tithes at the common law, in pernancy. And hence it is that the parſon, or vicar of one pariſh, that hath part of his glebe lying in another pariſh, may preſcribe in *non decimando* for it; that is, (as hath been ſaid) to be free from the payment of any manner of tithe for the ſame. 1 Rol. Abr. 653. Gibs. Cod. 674. *De non decimando.*

But this general rule, that none but ſpiritual perſons or corporations may preſcribe in *non decimando*, is to be underſtood with ſeveral exceptions; as, firſt, that the king, as being *mixta perſona* may preſcribe *de non decimando*; by the ſame rea-

ſon, that, as ſuch, he is capable of tithes. Gibs. 674. Jones (W.) 387. Mo. 483.

Secondly, that the leſſee, tenant at will, and copyholder of a ſpiritual perſon, though a layman, ſhall, in this reſpect, enjoy the exemption of the leſſor, who is ſuppoſed to reap the benefit of it, in reſerving ſo much the greater rents, by reaſon of ſuch exemption. 1 Rol. Abr. 653. Dig. p. 2. c. 16. 2 Rep. 78. 1 Leon. 248. 1 Cro. 785.

Thirdly, that a county, or part of a county, may well plead a cuſtom *de non decimando*, in reſpect of this or that particular tithe; as hath been pleaded and allowed, in the caſe of tithe milk of ewes, and of tithe of Underwood in the Wild of Kent, and in forty pariſhes in the Wild of Suſſex. But a ſingle pariſh may not preſcribe *de non decimando*, for particular tithes; nor may any larger diſtrict plead a cuſtom, abſolutely to have their lands freed from the payment of *all* tithes, without any thing in lieu. And leſt this allowance of a cuſtom, *de non decimando*, to laymen, in any caſe, ſhould ſeem to break in upon the general rule, the diſtinction which hath been laid down is this; that in things tithable by cuſtom only, and not *de jure*, a county or hundred may preſcribe in *non decimando* generally, for in that caſe they are diſcharged, without a cuſtom to the contrary; ſo that it is but to inſiſt on the old right, againſt which the cuſtom hath not prevailed; but for things which are tithable *de jure*, a county or hundred cannot preſcribe in *non decimando*, no more than a particular perſon; for it would be abſurd to ſay, that a hundred ſhall preſcribe in *non decimando*, where the particular perſons of which it conſiſts, cannot ſo preſcribe. 2 Salk. 655. L. Raym. 187. Gibs. 674. 1 Rol. Abr. 653, 654.

It was long a queſtion undetermined, whether a lay impropriator, as well as a clergyman, be intitled to recover the tithes, without proving payment;

ment; or, whether a *non decimando* may be pleaded againſt a lay impropriator: but in the caſe of *Benſon* and *Olive*, T. 1730, in the Exchequer, *Pengelly*, chief baron, delivered it as his opinion, that a lay impropriator, is under no neceſſity of proving payment of tithes unto him. Bunb. 274.

So in the caſe of lady *Charlton* againſt ſir *Blundel Charlton*, in the ſame court, lord chief baron *Reynolds* declared it as his opinion, that there can be no preſcription in *non decimando*, againſt a lay rector, any more than againſt a ſpiritual rector; and that they are equally intituled to tithes of common right; and that it is ſufficient for a lay rector to ſet forth in a bill, that he is ſeiſed of the impropriate rectory; and if he maketh out his title to that, it will be ſufficient, without putting him to the proof of having received tithes. And to this opinion, baron Comyns ſeemed to aſſent; but he made a diſtinction between one who ſets up a title to the rectory, and one who intitles himſelf only to the tithes, or any ſpecies of tithes, within a pariſh; for in this laſt caſe, the plaintiff ſhall be held to ſtrict proof, not only of his title, but alſo of the perception of all the tithes he ſets up a title to: and, in this preſent caſe, the plaintiff having ſet forth a title in ſir *Francis Charlton* (under whom ſhe claimed) to all the tithes in the pariſh of Lucford (except ſuch ſmall tithes as the vicar uſually received) and not to the rectory; and the defendant denying the plaintiff's title to the herbage, and the plaintiff not being able to prove any herbage tithe ever paid, though ſhe attempted to prove an unity of poſſeſſion for above ſeventy years, yet the bill was diſmiſſed. Bunb. 325.

And finally, in the caſe of the corporation of *Bury* againſt *Evans*, Trin. 1739, this point ſeemeth at laſt to have been ſettled; wherein it was determined, that there can be no preſcription in *non decimando*, even againſt a lay impropriator; and that

the preſumption which ariſeth from a conſtant non-payment, will not be ſufficient, unleſs the defendant can ſhew, either that the lands were parcel of one of the greater abbies, diſſolved by the 31 H. 8. or that ſome of the impropriators had releaſed the tithes. Comyns 643. Bunb. 345.

But if a *vicar* ſue for tithes, and the pariſhioner being a layman, denies that the ſaid tithes are due to him; in ſuch caſe, unleſs the vicar ſhall prove that the tithes in queſtion are due to him by endowment or preſcription, he ſhall fail in his ſuit: and the reaſon is, becauſe all the tithes, *de jure*, or in preſumption of law, belong to the rector, and therefore the vicar ſhall receive only thoſe tithes which he enjoyeth by cuſtom or preſcription, or by the endowment. 1 Ough. Ord. Jud. 264.

De modo decimandi.

Modus decimandi is thus deſcribed by lord *Coke*: *Modus decimandi* is, when lands, tenements, or hereditaments, have been given to the parſon and his ſucceſſors, or an annual certain ſum, or other profit, always, time out of mind, to the parſon and his ſucceſſors, in full ſatisfaction and diſcharge of all the tithes in kind of ſuch a place. And this may be pleaded by the lord of a manor, for the tithes of his manor, on account of lands of the gift of one who was lord of the manor, and held by the parſon and his ſucceſſors, time out of mind; and by a pariſh or hamlet, for this or that ſort of tithe, by reaſon of lands enjoyed by the parſons time out of mind, within ſuch pariſh, or hamlet; and, laſtly, by any *private perſon*, for his own lands or part thereof, in conſideration of a certain ſum of money, or other recompence. Gibs. 674. Deg. p. 2. c. 16. 3 Cro. 587.

Modus muſt have a reaſonable commencement.

But to make any of theſe a good cuſtom or preſcription, it muſt have the ſeveral qualifications following: as, firſt, every modus muſt be ſuppoſed to have had a reaſonable commencement; and in every preſcription *de modo decimandi*, it is to be

be intended the rate tithe was the full value of the tithe, at the time of the original compoſition; for it cannot be preſumed, that the biſhop, patron, and ordinary, would make a compoſition to the prejudice of the church; and if the modus do not now reach the value, it is to be intended, that either the tithes are improved, or elſe that money is now become of leſs value, which makes the preſent inequality. Deg. p. 2. c. 16.

By *compoſition real* is meant, where the preſent incumbent of any church, together with his patron, and ordinary, do agree by deed under their hands and ſeals, or by fine in the king's court, that ſuch lands ſhall be freed and diſcharged of the payment of all manner of tithes for ever, paying ſome annual payment, or doing ſome other thing to the eaſe, profit, or advantage of the parſon or vicar to whom the tithes did belong. And theſe real compoſitions have ever been held and allowed here in England, to be a good diſcharge of the payment of tithes. And from theſe real compoſitions it is intended, that all preſcriptions *de modo decimandi*, firſt took their riſe and beginning; tho' it is not to be doubted, that moſt of them at this day, have grown from the negligence and careleſſneſs of the clergy themſelves. Deg. p. 2. c. 20.

But now, ſince the ſtatute of the 1 Eliz. (in the caſe of archbiſhops and biſhops,) and the ſtatute of the 13 Eliz. (in the caſe of all other eccleſiaſtical corporations, ſole and aggregate) it is agreed on all hands, that no *real compoſitions*, any more than *alienations*, can be made; ſince all grants are thereby expreſsly reſtrained, and made void, which are not according to the tenor of thoſe ſtatutes. And the only modus that can grow now, muſt be from the inadvertency of the clergy acquieſcing in the ſelf ſame agreements, from one ſucceſſor to another. Gibs. 675, 676.

Where a real compoſition hath been made, if the lands diſcharged thereby be transferred or granted to another, the feoffee or grantee ſhall have the benefit of it. Gibs. 675. Jones (W.) 369.

But it is not now neceſſary to ſhew, that the modus had at firſt a reaſonable commencement; for theſe modus's having been from time immemorial, none can know but there were ſuch circumſtances in thoſe ancient times, as might have made ſuch a compoſition reaſonable, though at preſent they may not be diſcoverable. It is enough to ſatisfy us, at this great diſtance of time, that the parſon, patron, and ordinary, before the reſtrictive ſtatutes, might bind the revenues of the parſon; and that all theſe modus's muſt have had their commencement from an inſtrument ſigned by the parſon, patron, and ordinary; but there can be no colour to ſay that, becauſe ſuch inſtrument, in ſo great a length of time, hath been loſt, therefore the modus ſhall be loſt alſo. Indeed ſo far the law hath gone in favour of the church, as that if the inſtrument which the parſon, patron, and ordinary, had given to a layman, owner of ſuch a farm, to diſcharge the farm of all tithes (though this would be good while the inſtrument could be ſhewn) ſhould be once loſt, this being a privilege in *non decimando*, the privilege would be loſt by the loſs of the deed. 2 P. Will. 573. Gibs 675.

Modus muſt be for the parſon's benefit.

The modus muſt be ſomething for the benefit and intereſt of the parſon, and therefore, the finding ſtraw for the body of the church, the finding a rope for a bell, the paying five ſhillings to the pariſh clerk, the paying a quit rent to the lord of the manor; when theſe have been urged as diſcharges from tithes in kind, the modus's have been held not to be good. Deg. p. 2. 16. Gibs. Cod. 674. March, 65. 91. 1 Leon. 94. Siderf. 259.

But it is a good modus to be diſcharged, for that he hath uſed, time out of mind, to employ the profits

profits for the reparation of the chancel; for the parſon hath a benefit by this. 1 Roll. Abr. 650.

Modus muſt not be one tithe in lieu of another.

The modus muſt not be, one tithe paid in conſideration of another; as, it muſt not be to pay tithes of other kinds to be diſcharged of tithes for dry cattle; it muſt not be ſo much for every cow and calf for the tithe of herbage. Gibs. Cod. 574. Deg. p. 2. c. 16.

A bill was brought in chancery to eſtabliſh a modus in favour of the inhabitants of the pariſh of *Sturton*, in *Nottinghamſhire*. The modus was, in conſideration that after the graſs was cut, the pariſhioner, at his own coſts and charges, did make the tithe graſs into hay, by ſtrewing the graſs upon the ground (which is called tedding of it), and afterwards gathering it into week and windrows, therefore the perſons that inhabited within this pariſh (which pariſh appeared to be the greateſt part thereof meadow-land) were to pay no tithes for the herbage of dry and unprofitable cattle. But though it was proved in the cauſe, that the pariſhioners, time out of mind, had paid no tithe of this herbage, yet there was no evidence, that this excuſe for not paying tithes of herbage, was in conſideration of the pariſhioners making the tithe graſs into hay; on the other hand, it was proved, that foreigners, living out of the pariſh, made the tithe graſs into hay, as well as the inhabitants, and yet paid tithe herbage. And it was proved by the plaintiffs, that the graſs was tedded and ſpread, and not divided into heaps or cocks, until the ſame was made into hay. By King, lord chancellor: 1. This may be a good cuſtom or modus, to excuſe the occupier of the ſame land, wherein the pariſhioner made the graſs into hay, from paying tithes for the after herbage; but it can be no good modus, to excuſe the herbage tithe of other land: for at that rate, a man might mow and make into hay, only a ſmall parcel of ground, containing a quarter, or

half an acre of land, and by this means be excuſed from the tithe herbage of a hundred head of cattle. 2. It ſeems to be a material objection againſt this cuſtom, that foreigners living out of the pariſh, tho' they have no privilege of being tithe free, as to their herbage, yet have made the tithe graſs into hay; which looks as if it was the uſage of that pariſh, for the pariſhioners to make their graſs into hay of courſe. 3. It ſeems material what ſome of the witneſſes have proved, that in this pariſh the pariſhioners, when they cut down the graſs, did not divide it into ten parts, until ſuch time as they had made it into hay; for of conſequence, the parſon could not have any opportunity of making his tithe graſs into hay himſelf. And the bill was ordered to be diſmiſſed with coſts; but without prejudice as to any litigation that may be made touching the ſame at law. 2 P. Will. 520.

Modus muſt be different in kind from the thing that is due.

A modus muſt alſo be ſomething in its kind different from the thing that is due; and therefore a load of hay in lieu of tithe hay, or certain ſheaves of corn for all tithes of corn, is not a good preſcription; but it hath been ſaid, that this holds only in caſe the things are *de jure* titheable, and not by cuſtom only. Deg. p. 2. c. 2. Gibs. Cod. 675.

The preſcription was, to pay ten fleeces of wool and two lambs in lieu of all tithes; and *Price* and *Bury*, barons, were of opinion that this was an ill modus; becauſe it is one ſpecies of tithe for another; and there is great uncertainty, for one fleece may be twice as big, and three times the value of another. But *Ward* chief baron and *Smith* baron, were of the contrary opinion; for that a modus is nothing but a real compoſition for, or in lieu of tithes; or an annual profit certain and permanent: and they held, that the payment of any one chattel for tithe, was or might be

be a good modus, as well as money; for why might not the parſon originally agree to take ten fleeces for his tithe as well as a penny? They admitted that payment of tithe of one ſpecies, or payment of a modus for one ſpecies of tithe, could not be a diſcharge as to another ſpecies; but they held, that this was not a payment of tithe, nor a payment for a ſpecies of tithe; becauſe it was to be paid at all events, whether there be ſheep or no; and they denied the caſe of 1 Roll. Abr. 651. and held it no more uncertain than to pay a modus of ten cheeſes, which may differ vaſtly, both in nature, quantity, and value; and it tends to the diſquiet of the country, to break in upon cuſtoms and uſages, and it ought not to be done but on plain and manifeſt reaſon. 2 Salk. 656.

Every modus muſt be certain; and if it is uncertain, no length of time will make it good. Thus a preſcription to a penny, or thereabouts, for every acre of arable land is void for the uncertainty. 2 P Will. 572. Modus muſt be certain.

Thus on a bill to eſtabliſh a modus payable on or about the twenty fifth day of April yearly, it was objected to the uncertainty of the time of payment; and the court allowed the objection; but gave the plaintiff liberty to amend, upon paying the coſts of the day. Bunb. 198.

So alſo, a modus to pay four ſhillings for every day's ploughing of wheat, and two ſhillings for every day's ploughing of barley, hath been adjudged to be ill; it being uncertain how much every day's ploughing was. 2 P Will. 462. 2 Salk. 657.

So the payment of two ſhillings in the pound, of the *improved* rent in lieu of all tithes, was held to be naught; for that is to riſe and fall as the land is lett, and the parſon cannot know it; whereas every modus ought to be as certain, as the duty

duty which is deſtroyed by it. 2 Salk. 657. Lord Raym. 1158.

A bill was brought to eſtabliſh a modus; which was laid thus: for payment of ſuch a ſum of money, while the lands are in the hands of the proprietors; but if in the hands of any other perſon, to pay tithes in kind, or the money, at the election of the parſon. Lord chancellor King ſaid, that he would never eſtabliſh a modus againſt a parſon without a trial at law, if he deſires it; but this modus is clearly ill, for a modus cannot be deſultory. Select Ca. in Chan. 52.

But in the caſe of *Chapman* and *Monſon* Hil. 1729, a modus that every occupier of land within the pariſh, living out of the pariſh, ſhall pay a penny an acre for all paſture land, within the pariſh, but if he lives within the pariſh, to pay tithes in kind, was adjudged to be a good modus: and this was ſaid to be the leſs unreaſonable, becauſe the tithes are given as a reward for the trouble and care which the parſon takes of the ſouls of his pariſhioners, in which caſe the labourer is worthy of his hire; but then, as the parſon is not bound to go out of his pariſh to viſit thoſe who only occupy land within the pariſh, ſo it is but reaſonable, that they who have not the benefit of the parſon's care ſhould anſwer the leſs duty to him. 2 P. Will. 565.

It was ſaid by *Pengelly* chief baron, that in an anſwer to a bill for tithes, it is not abſolutely neceſſary to expreſs the day of payment of a modus inſiſted on, but this may be ſupplied by evidence, ſo as to be a foundation for the court to direct an iſſue at law to try the modus; but in a croſs bill to eſtabliſh a modus, a day muſt be expreſsly alledged, otherwiſe it will be fatal. Bunb. 328.

And many modus's have been ſet aſide in regard that no day of payment was ſet forth by the defendant,

fendant, as in the caſe of *Whitehall* and *Offley*, Trin. 5 G. Mr. *Offley* had ſued *Whitehall* in the ſpiritual court for tithes. *Whitehall* moved for a prohibition, and ſuggeſted a modus, but ſet forth no day of payment; for want of which the court was of opinion it was naught.

E. 8 G. *Godard* rector of Caſtle Eaton in Wilts, v. Kable; the defendant inſiſted upon ſeveral modus's, viz. three-pence for a milk cow, three-pence for a lamb, three-pence for a colt, one penny for a garden, and the like; but they were all ſet aſide, in regard no time for the payment thereof was aſcertained by the defendant.

T. 8 G. *Woodford*, vicar of Elbeſhame, alias Enſom in Surrey, againſt *Croſſe*. Modus, four-pence a cow for milk, and calf; two-pence, for a dry beaſt, three-pence for a lamb; and ſo on; but no day of payment ſet forth by the defendant; ſet aſide for the ſame reaſon.

Penrice, vicar of *Dodderhill* in Worceſterſhire, v. *Dugard*. Modus of 4l. 10s. for all ſmall tithes ariſing on an eſtate called *Impry*; ſet aſide becauſe no day of payment was ſet forth by the defendant in his anſwer.

Pemberton vicar of Belchamp St. Paul's in Eſſex, againſt *Sparrow* and others; ſeveral modus's ſet aſide for the ſame reaſon.

T. 8 G. *Corpus Chriſti*, v. *Vincent*. Modus, 1½ for a young milk cow, and two-pence for an old milk cow; ſet aſide for the ſame reaſon.

And the reaſon theſe decrees go upon is, that tithes in kind, being a proviſion made by law for the clergy, which become due at a certain determinate time, and which if not then ſet forth are immediately demandable, ſhall not be taken from them by an uncertain payment, which becomes due on no determinate day, and which they cannot know when to demand, or go about to receive, if it be withheld. Beſides that ſuch an uncertainty lays a foundation for many diſputes; as in the caſe of

of the death of an incumbent when tithes are paid in kind, all tithes ſevered before his death go to his executor, the reſt to his ſucceſſor; but if a modus to be paid on no certain day ſhould be allowed, no one could determine in that caſe whether it ſhould go to the executor of the preceding incumbent, or to the ſucceſſor. But it ſeemeth to be now held, where an annual modus hath been paid, and no certain day for the payment thereof is limited; that the ſame ſhall be due and payable on the laſt day of the year. 2 B. Ecc. L. 395.

Modus muſt be ancient.

A modus muſt be ancient; and therefore if it is any thing near the preſent value of the tithe, it will be ſuppoſed to be of late commencement, and for that reaſon will be ſet aſide, as in the caſe of *Benſon*, impropriator of Bromley St. Leonard, Middleſex, againſt *Watkins* and others, H. 3 Geo. The following modus, viz. 5s. an acre for tithe of winter corn, 4s. an acre for ſummer corn, 2s. 6d. an acre for upland meadow, and 3s. an acre for low land, were ſet aſide as too big.

So in the caſe of *Lloyd*, vicar of Epping in Eſſex, againſt *Small* and others, 4 G. The defendants inſiſted on ſeveral modus's for all ſmall tithes ariſing out of their reſpective farms, but it appearing by their anſwer, that their ſmall tithes in kind, in the year demanded by the bill, did not amount to more in that year than the pretended modus's, the modus's were ſet aſide.

Trin. 2 G. *Franklin*, *Jenkins* and others. The bill was brought by the pariſhioners of Farnham in Hampſhire, againſt the vicar and tenant of the impropriator there, under the hoſpital of St. Croſs, to eſtabliſh ſeveral modus's, amongſt other things; ſome of which were ſet aſide as too big, and among the reſt a pretended modus of 6d. for the tithe of a calf.

So

So in the caſe of *Layfield*, rector of Chiddingford, in Surrey, againſt *Euknap*, two ſhillings and Six-pence for a tithe lamb, was ſome years ago ſet aſide as too big for a modus. And the reaſon theſe decrees go upon is this: that the value of money being much greater at the time when all modus's are preſumed to have begun, than it is now, a modus near the value of the tithes at this day muſt have been at that time a great deal more; and it is not to be ſuppoſed, that the pariſhioners would at any time give ſo much more than the value of their tithes. 2 B. Ecc. L. 396.

Modus muſt be durable.

A modus muſt be ſomething durable; becauſe the tithe in kind is an inheritance certain, and it is againſt nature that it ſhould be extinguiſhed by a recompence not as durable at leaſt, though not ſo valuable; for this reaſon, four pence to be paid yearly, by two perſons inhabiting two ſuch houſes, in conſideration of all tithes, hath been adjudged ill; becauſe the houſes may decay, or none live in them. Gibs. 675. 1 Cro. 139.

Modus muſt be without interruption.

Cuſtom or preſcription muſt be conſtant without interruption, and perpetual, from the time whereof the memory of man is not to the contrary; for if there had been frequent interruptions, there can be no cuſtom or preſcription obtained; but after a cuſtom or preſcription is once duly obtained, a diſturbance for ten or twenty years ſhall not deſtroy it. Deg. p. 2. c. 13.

Modus how deſtroyed.

As every conſideration will not make a good modus, ſo a modus, though founded upon good conſideration, may be ſeveral ways diſcharged, and tithes become due in kind: (1) Where land is converted to other uſes; ſo when the preſcription is for hay and graſs, ſpecially, in ſo many acres of land; if the land is converted into a hop-garden or tillage, the preſcription is gone. (2) By the alteration or deſtruction of the thing, for which the money was paid; as where two fulling

fulling mills were under the ſame roof, and turned into a cornmill; where alſo there was one pair of ſtones in a mill, and another pair was added; and where the water-courſe was altered by the owner, and the mill was pulled down and re-edified upon it; in all theſe caſes, it was adjudged that the modus was gone. But where a man was ſeiſed of eight acres of meadow, and one of paſture, for the tithes whereof he had paid time out of mind, five ſhillings and four pence, and afterwards the owner built a corn-mill upon the ſame; it was adjudged that he ſhould pay no other tithes for the corn-mill, becauſe the land was diſcharged by the modus. 2 Inſt. 490. Gibs. 675. 1 Rol. Abr. 651. (3) By non payment of the conſideration or payment of tithes in kind, for ſo long a time, as to deſtroy the poſſibility of making proof that ſuch cuſtom or preſcription was: but an interruption for ſome ſhort time only, will not diſcharge it; eſpecially if made by the leſſee, to the prejudice of the leſſor. Wats. c. 47. Gibs. 675. 2 Bulſt. 240.

Modus how to be tried.

The rule is, that the modus is to be ſued for in the eccleſiaſtical court, as well as the very tithe; and if it be allowed between the parties, they ſhall proceed there; but if the cuſtom be denied, it muſt be tried at the common law; and if it be found for the cuſtom, then a conſultation muſt go; otherwiſe the prohibition ſtandeth. The like is affirmed, in caſe a jury upon an iſſue joined in a prohibition upon a modus *decimandi*, find a different modus; ſince a modus is found, they ſhall not have a conſultation. 2 Inſt. 490. Gibs. Cod. 691.

The principal reaſons why the courts of common law prohibit the ſpiritual court from trying of modus's, are, that whereas every modus is leſs than the real value, the rule of the canon law is,

is, that leſs than the real value ſhall not be taken, and that a cuſtom to the contrary is void; and that the eccleſiaſtical and temporal laws differ in the times of limitation; forty years or under making a good cuſtom by the eccleſiaſtical laws, whereas by the temporal laws, it muſt be beyond the time of memory. Gibs. Cod. 691.

But the ſpiritual courts have commonly allowed, and do allow, pleas of *modus decimandi*; and the averment in the prohibition, is not that they do take cognizance, but that the plea hath been offered and refuſed; which ſuppoſeth, that if the plea be admitted, the prohibition ought not to go. And accordingly it hath been affirmed, by Doderidge and others, that the ſpiritual court may a well try the modus, as the right of tithes, an that a prohibition is not to be granted, till the ſpritual court either refuſe to admit the plea, proceed to try it by methods different from th rules of the temporal law, as to the time of limitation, or number of witneſſes, or the like. And where lord Coke contended for the contrary doctrine, it was declared by Kelynge and Twiſden, in the caſe of the biſhop of *Lincoln* againſt *Smith* that in caſe one libel for a *modus decimandi*, the ſpiritual court allow the plea, they may tr it. Gibs. 691.

But, notwithſtanding, it ſeemeth now to b clearly ſettled, that if a *modus decimandi* be ſue for in the eccleſiaſtical court, a prohibition lies t ſtop the trial of it, if the modus be denied; and th reaſon is, not upon the account that the ſpiritua court wants juriſdiction, but in regard of the notion the temporal law hath of cuſtom different from the ſpiritual. And ſeeing that every modus is due by cuſtom, it is the common law only that can determine, what time and uſage with us ſhall be ſufficient to create ſuch a cuſtom, that is, time beyond all memory to the contrary. Whereas, by the

ſpiritual

ſpiritual law, ſometimes ten years, ſometimes twenty, they will adjudge ſufficient to create a cuſtom. And prohibitions in ſuch caſes are granted, not becauſe the ſpiritual court hath not juriſdiction of the matter, but in reſpect of the trial, which is to be by the temporal law only; and if upon the trial it be found for the modus, the proceedings ſhall go on in the ſpiritual court; if againſt the modus, the prohibition ſhall ſtand. Watſ. c. 56.

f There having been two verdicts in this caſe in favour of the plaintiff in equity, the modus was now eſtabliſhed with the coſts at law, but none were given with regard to proceedings in equity; for lord *Chancellor* ſaid, the ſuit in this court was merely for the ſecurity of the plaintiff, and to prevent any farther impeachment of his right to an *exemption* for the payment of tithes in ſpecie; and that this was like the caſe of a bill brought to perpetuate the teſtimony of witneſſes, wherein coſts are never given againſt the defendant: that the plaintiff might have applied for a prohibition, and if he had ſucceeded therein at law, he would have had his coſts, and he ought to have the ſame advantage with regard to the *proceedings at law*, directed by this court; but that there was no preſence for any other coſts. His lordſhip decreed the modus to be eſtabliſhed, and ordered the defendant to pay coſts to the plaintiff, in reſpect to the proceedings at law, to be taxed; but as to coſts in equity, relating to the *modus's*, *his lordſhip* did not think fit to award any to be paid by either of the ſaid parties. In Chan. Jan. 28th, 1737. By lord *Hardwicke*. Atkins's Rep. 610.

CHAP.

CHAP. IV.

An Alphabetical Table or Index of things titheable, and not titheable.

ACORNS (which are included in the name of *Maſt*) are the chief of thoſe things, which the ancient laws call *Pannage*. Gibs. Cod. 676. Acorns.

Maſt of oak or beech, if ſold, the tenth penny is payable for the tithe thereof; but if eaten by ſwine, then the tenth value or worth thereof. Godol. 417. And ſo Lindwood ſaith, if the ſaid fruits ſhall be ſold, there ſhall be paid the tenth penny: and if they be not ſold, but the hogs do feed thereupon, then the owner of the hogs ſhall pay the tithe according to the value of ſuch fruits. Lindw. 200.

There is a writ of conſultation in the regiſter for the tithes of pannage. And lord Coke (11 Rep. 49. a.) ſays, for *acorns*, tithes ſhall be paid, becauſe they renew yearly. And in *Reynolds*'s caſe, Trin. 2 Jac. 1. it was ſaid, that of *acorns* ſevered tithes are payable. Gibs. 676.

But where the caſe was, that the acorns dropt from the trees, and the hogs eat them, a diſtinction was made, that they ſhall not be tithable, unleſs gathered and ſold. Het. 27. Litt. 40. Gibs. 676.

In ſhort, the caſe of acorns ſeemeth not different from that of other things tithable; if gathered, they ſhall pay tithes in kind; and the tenth penny, or two ſhillings in the pound, in all ſuch like caſes, is not to be conſidered as excluſive of the tithes to be paid in kind, but only as a reſonable ſatisfaction, when the pariſhioner diſpoſeth of his whole produce unſevered. And where the acorns are not gathered by the owner, but ſuffered to be fed upon

as they drop; the caſe ſeemeth to fall under the ſame equity, as where turneps are fed upon by unprofitable cattle, for which an agiſtment tithe ſhall be paid. 2 B. E. L. 423.

After-eatage.

If a man pay tithes of Corn, he ſhall not pay any tithes for the after paſture of that land for that ſame year, nor for agiſtment in ſuch after graſs. 1 Roll. Abr. 641.

But if, after the crop is taken off, the land ſhall be ſown with turneps, he ſhall pay tithes of ſuch turneps: for that is a new increaſe. Bunb. 314. 8. Vin. Abr. tit. diſmes Z.

After-math or after-mowth.

The general rule in this caſe is laid down by *Rolle*, who ſays, that of after mowth, that is, the ſecond mowth, tithes ſhall be paid *de jure*, without a ſpecial preſcription, to be diſcharged by payment of the tithes out of the firſt mowth, and then it ſhall be diſcharged. 1 Roll. Abr. 640.

But ſir Simon Degge ſays, that tithes are not to be paid of the after-mowths of meadows: but if the meadowing be ſo rich that there are two crops of hay got in one year, there the parſon have tithe as well of the latter as of the former crop. Deg. p. 2. c. 3.

But if the occupier of the land can preſcribe, that in conſideration the owner doth make the firſt tonſure into good and ſufficient hay, and ſet it forth in cocks ſufficiently dried, then he ſhall be diſcharged of the tithes of the after-mowth; this is a good preſcription and diſcharge, by reaſon of the labour and coſts he beſtowed in making the firſt tonſure into hay. See 1 Rol. Abr. 648. 1 Cro. 404. 3 Cro. 660. 2 Cro. 42, 116. Moor 910.

Or if the preſcription be, to be diſcharged of the tithe of the after-mowth, only upon conſideration that they have uſed, time out of mind, to cut down the graſs of the firſt mowth, and the ſame to tedd and ſhake abroad, and the ſame graſs ſo diſperſed and caſt abroad to gather into weaks and windrows, and put

put it into ſmall cocks at their own coſts; this is ſufficient, tho' it be not made into perfect hay. Cro. Ja. 42.

And in the caſe of *Norton* and *Brigs*, Trin. 9. Will. 3. it was ſaid by *Treby*, chief-juſtice, and tithes are not payable for aftermowth *de jure*; that therefore it is but form to lay a cuſtom to be diſcharged of tithes of aftermowth, in conſideration of making the former mowing into hay; for tithes are payable only of things renewing once in the year. L. Raym. 242.

If a man pay tithes of hay, it is ſaid, that no tithes ought to be paid, *de jure*, afterwards, for the paſture of the ſame land for the ſame year; for he ſhall not pay tithes twice in a year for the ſame thing: for the after-paſture is only the relicks of the hay, of which he hath paid tithes before. 2 Inſt. 652. 1 Rol. Abr. 640. Nor for agiſtments in ſuch after-graſs. 1 Roll Abr. 640. Bunb. 1, 7. But this is to be underſtood, where no more graſs is left by the ſcythe than is uſual; for if more graſs than uſual is fraudulently left, the caſe is otherwiſe. 2 Bulſt. 238. After-paſture.

If an inn-keeper pay tithes of hay of certain land, and the reſt of the year aftewards, putteth into the ſame land the horſes of his gueſts, which come to market there, in the ſame town; it is ſaid, no tithes ſhall be paid for the herbage of thoſe horſes, for this is only the after-paſture of the land, whereof he hath before paid tithes. 1 Rol. Abr. 641, Gibs. Cod. 676.

Agiſtment is the feeding of cattle upon paſture land, which pay no other tithes; and is ſo called from the French, *geyſer*, giſter, [*jacere*] lie; becauſe the beaſts are levant and couchant, that is, lying and riſing. So *Agiſter* in a foreſt, in an old verſion of the *charta de foreſta*, is called *gyſttaker*. 4 Inſt. 293. Ken. par. Ant. Gloſs. Agiſtment or paſturage.

Tithe of agiſtment of cattle is due of common right; becauſe the graſs which is eaten, is *de jure*

tithable, and muſt have paid tithe, if cut when full grown. L. Raym. 137. 2 Salk. 655. 2 Inſt. 651. 4 Mod. 336. Comb. 403.

The general rule with reſpect to agiſtment is, that it is to be paid for beaſts agiſted for hire; or for dry or barren cattle, that do otherwiſe yield no profit to the parſon: and not for cattle which are nouriſhed for the plough or pail, and ſo employed in the ſame pariſh; becauſe the parſon hath tithe for them in another kind. 2 Inſt. 652. Deg. p. 2. c. 5.

But if a foreigner that lives in another pariſh, depaſtures ground for cattle bred to the plough and pail, to be employed in a foreign pariſh; he ſhall pay tithe for the agiſtment of ſuch cattle. Deg. p. 2. c. 5. L. Raym. 129.

Alſo if the ſame cattle are turned off to be fatted, and are grazed, there tithes of agiſtment ſhall be paid; ſince they are no way beneficial to the parſon in any other tithes. And ſo of cows after they are become barren, and are fatted for ſale. Gibs. 676. Show. Ca. 193.

The like is to be ſaid of horſes; that while they are kept for the uſe of huſbandry, no tithe ſhall be paid: but if horſes be kept for ſale, or to carry coals, or for the like offices which are profitable to the owner, and not profitable to the parſon, tithe ſhall be paid for them. Gibs. 676. Poph. 126. 2 Cro. 430. Hetl. 93. 1 Rol. Abr. 646.

But ſaddle horſes ſhall pay no tithes, no more than cattle for the plough and pail, or cattle killed for the uſe of a man's own family, in reſpect of the profit that otherwiſe accrues to the parſon from theſe. Bunb. 3. 1 Rol. Abr. 641.

But if they be horſes of travellers, or others taken in as gueſt horſes; it is agreed by all, that tithe agiſtment is due, becauſe no profit otherwiſe accrues to the parſon from them. Gibs. Cod. 682. 1 Bulſt. 171. Poph. 126.

In

In the caſe of *Thorp* and *Bendlowes*, in the exchequer, T. 1762. *Thorp*, as rector of *Houghton* in the county of Durham, filed his bill againſt Bendlowes (amongſt other things) for the tithe agiſtment of his coach-horſes, ſuggeſting, that the horſes were not kept for pleaſure only, but that the defendant made a profit of them, by employing them to fetch his coals at ten miles diſtance out of the pariſh, and in loading manure, brick, and wood, from the pariſh of Houghton to the defendant's lands in the pariſh of Darlington, which is the next adjoining pariſh; which fact was proved in the cauſe. The defendant by his anſwer inſiſted, that the horſes were kept for his coach, and for pleaſure only, and were not liable to pay any tithe for agiſtment, as barren and profitable cattle. The court were unanimouſly of opinion, that coach-horſes were liable to pay tithe of agiſtment, and decreed the defendant to account for the ſame, and to pay plaintiff his coſts. 2 B. E. L. 408.

If a man pay tithes in kind to the parſon, for his lambs, fleeces, and other things, going and ariſing upon his paſtures, waſtes, or other lands; it is ſaid, that he ſhall not afterwards, in the ſame year, pay tithes of agiſtment for the ſame paſtures, waſtes, or other lands. 1 Rol. Abr. 641.

But in the caſe of *Coleman* and *Barker*, E. 1726. where the ſuit was for the tithe of agiſtment of ſheep, which were depaſtured on turneps, remaining on the ground unſevered, it appeared that the defendant had paid tithe wool, and after ſhearing time, fed his ſheep with turneps, by which they were bettered five ſhillings a ſheep; and tithes were decreed for the depaſturing of thoſe ſheep. Gilb. 231.

And the like was decreed in the caſe of *Swinſen* and *Digby*, H. 1731. Bunb. 314. for in ſuch caſe,

the ſheep being turned off to be fatted, ceaſe to be profitable to the parſon in any other way.

The tithes for depaſturing unprofitable cattle ought to be paid by the occupier of the ground, and not by the owner of the cattle. Bunb. 3.

For if the occupier of the ground, were not in ſuch caſe made liable, it would be greatly inconvenient for the parſon to ſue every owner of the beaſts; and perhaps it would be hard to be known, and infinite. 1 Roll Abr. 656. Deg. p. 2. c. 5.

But if it is a common that is depaſtured, the owner of the cattle (if known) muſt pay the tithes, and not the owner of the ſoil; becauſe the owner of the ſoil hath no profit by it. Bunb. 3.

And if tithe of agiſtment be denied, ſuit may be commenced in the ſpiritual court againſt the occupier of the land, or in caſe they are gueſt cattle, either againſt the occupier of the land, or owner of the cattle; and no prohibition will lie. Gibs. Cod. 677. Jones (W.) 254. Hard. 184.

As to the manner of paying tithe for agiſtment, where no ſpecial cuſtom is, if it be paid for gueſt cattle taken in, it is ſaid, that the tenth part of the money received is payable for agiſtment; if for the owner's cattle, then the tithe ſhall be according to the value of the land, after the rate of two ſhillings in the pound: for that they cannot otherwiſe be valued, or accounted for, becauſe the profits of the lands for which they are paid, are received by the mouths of the beaſts. Gibs. Cod. 677. Hard. 184. Wats. c. 50.

But by cuſtom, or preſcription, ſuch tithes may be paid in other manner, as by the acre, and for all manner of cattle together, or the like. Wats. c. 50, Gibs. Cod. 677. Skin. 560. 2 Salk. 665. Carth. 392. Wats. c. 50. Bunb. 1.

It was ſaid by *Holt*, Ch. J. in the caſe of *Hicks* and *Woodſon*, 6 Will. and Ma. that tithes of barren

ren cattle are due, *de communi jure*, and two ſhillings per pound is the uſual tithe of common right, though there are divers *cuſtomary* manners of tithing for them. And the plea, that no tithes had ever been paid within ſuch a hundred, for the agiſtment of any cattle not uſed for the plough or pail, was rejected, and the cuſtom was declared a void cuſtom, and conſultation granted. Gibs. Cod. 677.

Where profitable and unprofitable cattle feed together, tithe ſhall be paid in kind for the profitable, and agiſtment for the unprofitable. Gibs. 677.

In the caſe of *Smith* and *Roocliff*, H. 1717: the barons were of opinion, that a modus of one ſhilling in the pound for paſture, according to the value of the land, was a void modus; as is alſo a modus of one ſhilling in the pound, according to the value of the rent. Bunb. 20. And the like was adjudged in the caſe of *Harriſon* and *Sharp*, Trin. 1724. Bunb. 174.

It was adjudged, Ann. 5 Jac. 1. that tithe of alders ſhall be paid, although they be of twenty years growth, and more. Gibs. Cod. 677. 2 Cro. 199. Alders.

This is frequently mentioned in the endowments of vicarages, as that which the vicar ſhall have for his maintenance; and upon ſuit in the exchequer, 21 Eliz. concerning the rights of the vicar of *Weſthaddon*, whoſe endowment was *altaragium cum manſo competenti*, it was determined (according to the definition of *altaragium*, given by the lord biſhop of *London*, upon conference with the judge of the admiralty, the dean of the arches, and four other doctors of the civil law) that by altarage, were underſtood tithes of *wool*, *lambs*, *colts*, *calves*, *pigs*, *goſlings*, *chickens*, *butter*, *cheeſe*, *hemp*, *flax*, *honey*, *fruits*, *herbs*, and ſuch other ſmall tithes, with *offerings*, that ſhall be due within the pariſh of *Weſthaddon*. The like alſo had been determined Altarage.

in the ſame court, in the caſe of *Norton* in *Northamptonſhire*, two or three years before. Gibs. Cod. 677.

Apples. In the fourth year of Char. I. libel was in the ſpiritual court for tithe of two pecks of apples: and the owner of the orchard praying a prohibition, upon ſurmiſe that he had but two pecks in all, and they were ſtolen; the court reſolved, that if the owner ſuffered another to pull his apples, the parſon ſhall have tithes; but otherwiſe, if they be taken by perſons not known, (for they are not titheable before plucking,) unleſs they are taken after the proper time of gathering, through the neglect of the owner in letting them hang too long. Gibs. Cod. 677. Hetl. 100.

Aſh. This is agreed on all hands to be timber, and ſo to be free from tithes, being of, or above twenty years growth. Gibs. Cod. 677. See Wood.

Aſp-trees. In the ſeventeenth year of Jam. I. a prohibition was prayed, in a ſuit of aſp-trees, in Buckinghamſhire; and it was granted, becauſe in that country, where timber is ſcarce, aſp, beech, and other like trees, ſerve for timber; and of aſp-trees the court ſaid, as a reaſon why they ought not to pay tithe, that they ſerve for arrows for defence of the realm: a circumſtance, which, it is to be hoped, will not now be judged ſufficient ground of exception, in other counties where it is not uſed for timber. Gibs. Cod. 677. 2 Rol. 83.

Bark. Bark, where the tree is a timber tree, ſhall pay no tithe; being privileged by the *body* of the tree. See *Timber*. Gibs. 677.

Barren land. What is, and is not barren land, and by conſequence ſtands diſcharged; is particularly ſhewn before in page 13 to 18.

Beans and Peaſe. If a man gather green peaſe to ſpend in his houſe, and there ſpend them in his family, no tithes ſhall be paid for the ſame; but if he gather them

them to ſell, or to feed hogs, there tithes ſhall be paid for them. 1 Rol. Abr. 647. Deg. P 2. c. 3.

It hath been diſputed, whether the tithe of beans and peaſe, gathered by the hand, and ſold for man's food, is a great or ſmall tithe. As in the caſe of *Sims*, vicar of Eaſtham in Eſſex, againſt *Bennet* and *Johnſon*, occupiers of lands within the ſaid pariſh, and *Wilks* and *Hitch*, impropriators of the rectory of the ſaid pariſh; December 6. 1762. Mr. *Sims*, the vicar, brought his bill in Chancery, in the year 1756, ſetting forth, that by the endowment of the vicarage, he is intitled to the tithes of gardens and curtilages, and all ſorts of tithes, except the tithes of ſheaves, and hay and mills, [*praeter decimas garbarum et fæni et molendinorum ad ventum*]; that the defendants, *Bennet* and *Johnſon*, holding ſeveral parcels of land in the ſaid pariſh, did in the ſame year, cultivate pieces of ſuch land with beans and peaſe, of ſuch ſort as are generally uſed for the food of man, which they gathered in the months of June, July, and Auguſt, by the hand, in the field, by plucking them from the ſtalk whilſt green, and ſent the ſame to market, and ſold them for the food of men accordingly; and inſiſting, that by the gathering beans and peaſe by the hand, ſo cultivated as aforeſaid, he, the ſaid Sims, as vicar, by virtue of the ſaid endowment, became intitled to the tithe thereof, and that no tithe ought to be paid for the ſame to the impropriator; nor ought beans and peaſe, ſo cultivated and gathered by the hand, by plucking from the ſtalk whilſt green, to be conſidered as part of the tithes appropriated to the rectory. To this bill the defendants put in their anſwers. And the defendant Bennet ſaid, that in the year 1756, he ſowed thirteen acres, or thereabouts, with peaſe and beans, in the open fields in the ſaid pariſh, and believed that in June, July, and Auguſt, in the ſame year, he gathered ten acres and half, or thereabouts,

thereabouts of the ſame, by the hand in the field, by plucking them from the ſtalk whilſt they were green, and ſold them in a cart by retail, by pecks and ſmaller quantities, in and about the pariſh of Eaſtham, and in the ſtreets of *London*; and the remainder of ſuch peas and beans were gathered into the barn, and threſhed. And the defendant *Johnſon* ſaid, that he ſowed five acres of beans and peas in like manner, and part thereof he plucked by the hand when green, and ſold the ſame in *London* ſtreets, and at market, and gathered the remainder in the barn. And both the ſaid defendants ſaid, that all their ground in the ſaid pariſh, ſowed with peaſe and beans in the ſaid year, was ploughed for that purpoſe, and no part thereof was dug with a ſpade, except under or near the hedges, where the ſame could not be ploughed, or in ſuch places as were too wet to be ploughed; and that the tithe of all beans and peaſe, whether gathered green or otherwiſe, having been always paid to the rector, and eſteemed to belong to him, they had therefore compounded with the impropriator for the ſame, and hoped they ſhould not be compelled to account alſo with the vicar for the ſame tithes. The defendants, Wilkes and Hitch, in their anſwer, inſiſted on their right as impropriators. Witneſſes were examined on both ſides; ſeveral of whom depoſed, that ſuch peaſe and beans as are uſed for the food of man had been cultivated in the fields and grounds of the pariſh of Eaſtham, only for about thirty years paſt, and were cultivated and gathered green off the ſtem, as uſually done in a garden (ſave only that in the field, the plough hath been generally uſed, and in the garden the ſpade,) and in rows, but in a different manner from thoſe planted and ſowed in fields, in the common courſe of huſbandry for provender, and not for man's food. And one of the witneſſes,

neſſes, Mr. Wyat, vicar of the pariſh of Weſtham, (adjoining to that of Eaſtham), ſaid, that in the year 1753, he commenced a ſuit in chancery againſt the impropriator and others of his ſaid pariſh for ſuch tithes, and that the then lord chancellor decreed in his favour, and he hath enjoyed the ſaid tithes ever ſince. On hearing, the lord keeper Henley decreed, November 10, 1760, that the vicar's bill ſhould be diſmiſſed, without coſts: upon this, Mr. Sims appealed to the houſe of lords, ſetting forth the following reaſons. 1. It is admitted by the reſpondents, that if the tithe of beans and peaſe, cultivated in a garden-like manner, and gathered by hand whilſt green, is a *ſmall* tithe, the ſame is not included in the exception out of the vicar's endowment. Many arguments may be offered to prove it ſuch. The quality of all tithes is to be determined at the time of ſeverance, when the right accrues. The ſame thing which produces a great tithe in one ſtate, and mode of culture, produces a ſmall tithe in another. If clover is cut for hay, it is conſidered as a great tithe; when ſuffered to grow for ſeed, it is conſidered as a ſmall tithe. This is alſo the caſe of tares; when cut green, they are referred to the claſs of ſmall tithes; when matured and dried before cut, they are referred to the claſs of great tithes.

The tithe in queſtion is certainly not a tithe of corn or grain, and it bears two marks of a ſmall tithe; the one, that it is in the nature of a garden tithe, being diſtinguiſhed out of the deſcription, not by difference of culture, but merely by the locality of ſetting beans and peaſe in fields; the other, that it is a new and modern culture. 2. Suppoſing the tithe in queſtion to be a *great* tithe; ſtill the vicar was intended to be endowed with it, becauſe it is not included in the exception out of his endowment. Peaſe and beans plucked by the

the hand, whilſt green, from the ſtem, however cultivated, or wherever planted, can never be tithed under the deſcription of *decimæ garbarum*. Spelman, in his gloſſary interprets *garba* to be *faſciculus*, either of fruits or wood. Du Freſne calls it *Spicarum Manipulus*. And Matthew of Weſtminſter ſaith, *frumenti manipulus, quem patriæ lingua dicimus* ſheaf, *gallice vero* garbam. But the tithe in queſtion cannot fall under the meaning of the word *garba*, being ſet out and taken by a meaſure totally different. 3. It doth not ſeem an objection of weight to the appellant's demand, that if tithes are paid to the vicar for peaſe and beans gathered green, another tithe will be claimed by the rector, when the ſtalks ripen and are cut down, by which means a double tithe is ſaid to be payable for the ſame thing. This will appear otherwiſe, when the matter is conſidered not in the light of paying two tithes for one thing, but of dividing the ſame tithe between two different owners, according to the grant of appropriation. The vicar will have his tithe of what is actually gathered green, and the rector of what is left, after it ſhall be cut down. 4. It is ſubmitted to be an objection of as little weight as the objection juſt anſwered, namely, that in conſequence of the appellant's reaſoning, the farmer will have it in his power to determine the property of tithes between rector and vicar, from the manner or place of culture, or time of gathering. But this is a contingency, which attends this ſort of right; the occupier being allowed by law to cultivate his lands, as he and the landlord ſhall think proper; which makes tithes in their own nature, a fluctuating and uncertain inheritance. On the other hand, the reſpondents hope the decree will be affirmed, for theſe (amongſt other) reaſons. 1. Becauſe a vicar cannot claim tithes of any kind but by endowment, or by uſage (which is only

only evidence of an endowment). In this caſe, there is no evidence of uſage; and therefore if the vicar is not entitled to the tithes in queſtion under the endowment, he is not intitled at all. But, 2. By the endowment, the tithes in queſtion are excepted out of the grant to the vicar; for the words *decimæ garbarum*, in the exception, have been always conſidered as technical terms, appropriated to, and deſcriptive of great tithes, to diſtinguiſh them from ſmall tithes. And *garba*, in its ſignification, comprehends peaſe and beans growing in fields, as well as all other ſorts of corn and grain growing in fields, ſo that peaſe and beans are in their own nature a great tithe, and excepted out of the vicar's endowment in this caſe, under the name of *garba*. 3. As to the objection, that in the preſent caſe, the peaſe and beans being plucked green, and ſold for the food of man, they are applied to the ſame uſe as beans and peaſe growing in gardens, which are a ſmall tithe; and that this tithe ought to take its denomination from the uſe the thing titheable is applied to, and therefore is a ſmall or vicarial tithe, and not within the meaning of *decimæ garbarum*: it is anſwered, that all the caſes relative to tithes, taken together, ſerve to prove, that the law denominates and adjudges tithes to be great or ſmall, according to the nature of the thing, and not from the mode of cultivation, or uſe to which the thing is applied. And therefore in this caſe, the application of the peaſe and beans in queſtion for the food of man, they not being, not falling under the denomination of tithes of gardens, technically called *decimæ hortorum*, ought not to convert the tithes in queſtion into ſmall tithes. And, after a full hearing, December 6th. and 7th. 1762 the lords affirmed the decree. 2 B. E. L. 400.

This

Beech. This, by the common law, is not timber, and ought therefore to pay tithe, of what growth ſoever it be; but where it hath been pleaded, that by reaſon of the ſcarcity of timber in this or that country, (particularly in Buckinghamſhire,) they are forced to uſe it for timber, the court hath adjudged it to be privileged by the Stat. of *Sylva Cædua*. Gibs. 677. 1 Rol. Abr. 640. 1 Mo. 541. 1 Rol. 355. 2 Rol. 83.

Bees. Tho' theſe are reckoned among the things that are *Feræ Naturâ*, and, by conſequence, tithe-free; yet, being gathered into hives, and become the *property* of particular perſons, it ſeems unreaſonable to rank them in that number. However, it hath been adjudged, that they ſhall not be paid in kind, by the tenth ſwarm; but that the tenth meaſure of *honey*, and the tenth pound of *wax*, ſhall be ſufficient. Gibs. 677. 1 Rol. Abr. 651. 3 Cro. 404.

Birch. Ann. 5 Jac. 1. it was held by the whole court, that tithes of birch ſhall be paid, altho' of twenty years growth, and more; and after ſome adviſement, conſultation was awarded: and Coke cited one Leonard's caſe, 34 Eliz. to be ſo adjudged. Gibs. 677. Mo. 907. 2 Cro. 199.

Brick. This is reckoned by lord Coke among other things which ſhall not pay tithe, becauſe, *of the ſubſtance of the earth*, and not *annual*; and it is ſaid, that 18 Eliz. a prohibition was granted to ſtay ſuit for bricks in the ſpiritual court, upon ſuggeſtion of the *general immunity*; which hath alſo been confirmed, and upon the ſame ground, by a latter judgment. Nor ſhall tithe be paid of the wood cut down for burning of bricks, ſo far as ſuch bricks are applied to the *repair*, or neceſſary *enlargement* of the owner's houſe; which circumſtance it is (and not the exemption of the the *bricks)* that gives privilege to the wood. 2 Inſt. 651. Gibs. 678.

It was held in the caſe of *Price* and *Maſcal*, 12 Jac. 1. that broom is tithable; notwithſtanding it was ſaid to be dug up in order to bring the land to tillage, which in the end would be for the benefit of the parſon. But when it was ſuggeſted in the court of King's-bench, 28 Car. 2. That the defendant in the ſpiritual court did keep houſe of huſbandry, and uſed the broom to burn; the plea was admitted, and prohibition granted. Gibs. 678. 2 Buls. 240. Broom.

The tenth calf is due to the parſon *de Jure communi*, to be taken when it is weaned, and not before; and it is recoverable in the ſpiritual court, as appears from a writ of conſultation in the regiſter. And in caſe there are fewer than ten, it hath been adjudged a good cuſtom, (and the cuſtom evidently ſprung from the canon law,) and if there are ſeven, the parſon ſhall have one calf; if under ſeven, then a half-penny, or what cuſtom ſhall direct for each calf. But whereas the canon-law leaves it to the choice, of the parſon, when there are under ſeven, whether he will proceed in that manner, or let them run on till one becomes due in the enſuing year; the common law will not allow of this, becauſe tithe muſt be paid *annually*; and ſo, when the parſon ſued for a ſeventh calf becoming due in that manner, prohibition was granted. Gibs. Cod. 678. 1 Rol. Abr. 648. Latch. 254. Calves.

In the caſe of *Egerton* and *Still*, T. 1725. it was decreed, that where there are above ten calves, lambs, piggs, or the like; the tithe of the odd number above ten ſhall be paid according to the value, and not be carried over to the next year. Bunb. 198.

A cuſtom of paying the tenth part of the price for every calf that is ſold, is a good cuſtom. Gibs. 678. 1 Rol. Abr. 648.

The

Beech. This, by the common law, is not timber, and ought therefore to pay tithe, of what growth ſoever it be; but where it hath been pleaded, that by reaſon of the ſcarcity of timber in this or that country, (particularly in Buckinghamſhire,) they are forced to uſe it for timber, the court hath adjudged it to be privileged by the Stat. of *Sylvæ Cædua*. Gibs. 677. 1 Rol. Abr. 640. 1 Mo. 541. 1 Rol. 355. 2 Rol. 83.

Bees. Tho' theſe are reckoned among the things that are *Feræ Naturâ*, and, by conſequence, tithe-free; yet, being gathered into hives, and become the *property* of particular perſons, it ſeems unreaſonable to rank them in that number. However, it hath been adjudged, that they ſhall not be paid in kind, by the tenth ſwarm; but that the tenth meaſure of *honey*, and the tenth pound of *wax*, ſhall be ſufficient. Gibs. 677. 1 Rol. Abr. 651. 3 Cro. 404.

Birch. Ann. 5 Jac. 1. it was held by the whole court, that tithes of birch ſhall be paid, altho' of twenty years growth, and more; and after ſome adviſement, conſultation was awarded: and Coke cited one Leonard's caſe, 34 Eliz. to be ſo adjudged. Gibs. 677. Mo. 907. 2 Cro. 199.

Brick. This is reckoned by lord Coke among other things which ſhall not pay tithe, becauſe, *of the ſubſtance of the earth*, and not *annual*; and it is ſaid, that 18 Eliz. a prohibition was granted to ſtay ſuit for bricks in the ſpiritual court, upon ſuggeſtion of the *general immunity*; which hath alſo been confirmed, and upon the ſame ground, by a latter judgment. Nor ſhall tithe be paid of the wood cut down for burning of bricks, ſo far as ſuch bricks are applied to the *repair*, or neceſſary *enlargement* of the owner's houſe; which circumſtance it is (and not the exemption of the the *bricks)* that gives privilege to the wood. 2 Inſt. 651. Gibs. 678.

It

It was held in the caſe of *Price* and *Maſcal*, 12 Jac. 1. that broom is tithable; notwithſtanding it was ſaid to be dug up in order to bring the land to tillage, which in the end would be for the benefit of the parſon. But when it was ſuggeſted in the court of King's-bench, 28 Car. 2. That the defendant in the ſpiritual court did keep houſe of huſbandry, and uſed the broom to burn; the plea was admitted, and prohibition granted. Gibs. 678. 2 Buls. 240. Broom.

The tenth calf is due to the parſon *de Jure communi*, to be taken when it is weaned, and not before; and it is recoverable in the ſpiritual court, as appears from a writ of conſultation in the regiſter. And in caſe there are fewer than ten, it hath been adjudged a good cuſtom, (and the cuſtom evidently ſprung from the canon law,) and if there are ſeven, the parſon ſhall have one calf; if under ſeven, then a half-penny, or what cuſtom ſhall direct for each calf. But whereas the canon-law leaves it to the choice, of the parſon, when there are under ſeven, whether he will proceed in that manner, or let them run on till one becomes due in the enſuing year; the common law will not allow of this, becauſe tithe muſt be paid *annually*; and ſo, when the parſon ſued for a ſeventh calf becoming due in that manner, prohibition was granted. Gibs. Cod. 678. 1 Rol. Abr. 648. Latch. 254. Calves.

In the caſe of *Egerton* and *Still*, T. 1725. it was decreed, that where there are above ten calves, lambs, piggs, or the like; the tithe of the odd number above ten ſhall be paid according to the value, and not be carried over to the next year. Bunb. 198.

A cuſtom of paying the tenth part of the price for every calf that is ſold, is a good cuſtom. Gibs. 678. 1 Rol. Abr. 648.

The

Cattle. The diſtinction of cattle, as tithable, or not tithable, hath been already ſettled under the head of agiſtment; and it may be a general rule, that ſuch cattle as be diſcharged from tithe of agiſtment, are (conſidered *per Capita*, and not in their product,) diſcharged from all other tithe, and have a right to plead an abſolute immunity; but cattle within the pariſh being liable to the tithe of agiſtment, are alſo liable to any other cuſtomary tithe. Gibs. Cod. 678. 3 Cro. 786.

The payment of tithes for other cattle which are liable to tithes, (as lambs, colts, calves, &c.) is not a ſufficient ſurmiſe to be diſcharged of the tithes of dry cattle in general; becauſe ſuch payment is not more than what was due, and cannot therefore be in ſatisfaction for the tithe of any other thing. Gibs. Cod. 678.

In the caſe of Fox, *verſus* Hyde; where the point was, to eſtabliſh a modus, for the non-payment of tithe for the herbage of dry and unprofitable cattle, in conſideration that after the graſs was cut, the pariſhioner at his own coſt and charges, did make the tithe-graſs into hay; tho' it was proved that the pariſhioners, time out of mind had paid no tithe of this herbage; yet the court held it to be a material objection againſt the modus, that foreigners being out of the pariſh, made the tithe graſs into hay, and yet paid tithe herbage; and that it would be too much in a court of equity to eſtabliſh this modus; eſpecially, where it was inſiſted on, (as in this caſe,) that the pariſhioners making tithe-graſs into hay, did not only excuſe the herbage of that ground from tithe herbage, but alſo all the tithe herbage that the pariſhioner was to pay for any land he depaſtured within the pariſh, tho' it might be a great parcel of paſture-land, and tho' the ſame might be fed all the year. Gibs. 678. 2 P. Will. 520.

Altho'

Altho' the tenth colt, calf, or lamb, be paid; yet if any of the reſt be reared, and ſold before they yield profit to the parſon, or be uſed for the plow; a tithe ſhall be paid of them. Gibs. 678. Hetl. 86.

An inhabitant in one pariſh has arable lands in another; and reſolved that he ſhall only be excuſed from payment of agiſtment for the cattle depaſtured in that other pariſh; ſo far as they are actually employed in plowing in the other pariſh, for the parſon ought to have ſomething in lieu of the loſs of thoſe tithes, which can only be of the plowing of the acres in the neighbouring pariſh. 1 Ld. Raym. 129.

Tithe of cattle feeding upon waſtes or commons, where the bounds of pariſhes are uncertain, ſhall be paid to the incumbent where the owner inhabiteth (as is expreſsly provided in Stat. 2. Ed. 6. cap. 13.) unleſs by cuſtom or preſcription they be limited to ſome certain incumbent. Gibs. Cod. 678. Sav. 60.

This, as being of the ſubſtance of the earth, and part of the freehold, hath been declared and adjudged not to be tithable. 2 Inſt. 651. 1 Mod. rep. 35. 2 Keb. 596. Chalk.

Tithe of cheeſe can only be due, where tithe is not paid of the milk; and payment of the tenth cheeſe in one part of the year (as from May-day till the firſt of Auguſt,) may be a good preſcription for diſcharge of tithable milk for the *whole* year. Gibs. Cod. 678. 1. Cro. 608. Mo. 909. Cheeſe.

In the regiſter, a conſultation is provided where prohibition hath been granted, in caſe of tithe-cheeſe. Gibs. 678. Reg. 49.

In the ſeventeenth year of James I. theſe were adjudged to be timber, in Buckinghamſhire, and other parts where other timber is ſcarce; and, Cherry-trees.

as ſuch, to be diſcharged of tithes. Gibs. 678. 2 Rol. 83.

Chicken. Upon a prohibition to ſtay ſuit in the ſpiritual court, for tithe chicken; it was reſolved, that they were not tithable, becauſe the eggs were tithed. Gibs. 678. 2 Rol. 83.

Clay. This is diſcharged of tithe, as being of the ſubſtance of the earth. 2 Inſt. 651. March 58.

Clover. In the caſe of *Wharton* and *Liſle*, it was ſaid by *Dolbon* and *Eyres* in the king's-bench, that it had been ruled at the aſſizes, that if a man ſow his land with clover, and make his profit of the ſeed, this being a grain, the parſon ſhall have a tithe of it; but if he convert it into hay only, and make his profit of the hay, the vicar being endowed of tithes of hay, ſhall have it as a ſmall tithe. Gibs. 405. Skin. 341.

Doctor Watſon ſays, the tithes of clover *graſs* ſhall go to him that hath the tithe hay. Watſ. c. 39.

And in the caſe of *Franklyn* and the maſter and brethren of St. *Croſs*, T. 1721; the vicar being endowed of tithe hay, it was decreed, that he was thereby intitled to clover, Saintfoin, and rye graſs; which are ſpecies of hay that is the genus. Bunb. 79.

But the *ſeed* of clover is in its nature a ſmall tithe. Watſ. c. 49.

Thus in the caſe of *Wallis* againſt *Pain* and *Underhill*, H. 1738, a bill was exhibited in the exchequer by the plaintiff *Wallis*, who was tenant or farmer under the impropriator of the great tithes in the pariſh of *Prittlewell* in *Kent*, and inſiſted that the defendant *Pain* ſowed a field with clover which was cut for hay, and that he let the aftermath grow for ſeed, which was cut and threſhed for ſeed, of which the plaintiff ought to have the tithe as a great tithe. The defendant *Pain* inſiſted, that he had paid to the plaintiff for the tithe

tithe hay of his clover; and that the aftermath of clover ſtood for ſeed, which was a ſmall tithe, and payable to the vicar. And Mr. *Underhill*, the vicar, inſiſted upon the tithe of clover ſeed as a vicarial or ſmall tithe. By the depoſitions of ſeveral witneſſes it appeared, that the difference between clover cut for hay, and that cut for ſeed, is conſiderable; when made into hay, it is cut while the graſs is green, and fit for cattle to eat; when cut for ſeed, it ſtands till the ſtalk is good for little or nothing, and the ſeed is the only thing of value or regarded. It was argued for the plaintiff, that clover ſeed is in the nature of it a great tithe, and therefore due to the plaintiff; for as tithe hay is due to him, the ſeed of that hay muſt of conſequence belong to him alſo; that where the parſon is intitled to tithe hay, he will be intitled to the hay made of clover, as well as of other graſs; and if to the hay, likewiſe to the ſeed. On the other ſide it was inſiſted, that clover ſeed is in its nature a ſmall tithe; that the tithe of no ſeed was ever looked on as a great tithe; and as to what was ſaid, that the ſtalk and ſeed ſhould go together, it is frequent that the ſeed or fruit of trees goes to the vicar, when the tree goes to the parſon: wood is always reckoned a great tithe, and goes to the rector, unleſs the vicar be ſpecially endowed with it; but acorns, as well as the fruits of all other trees, are always held as ſmall tithes. Lord chief baron Comyns delivered the reſolution of the court: that by the canon-law, as long as the diſtinction hath been made between great and ſmall tithes, which is as ancient as appropriations to the religious houſes, who uſually ingroſſed the great tithes, but left the ſmall tithes to the curate, all ſeeds have been reckoned as ſmall tithes. The common law ſeems to follow the canon law in this point. And all the reſolutions, relating to tithes, which

proceed from things newly introduced into England, have held them to be ſmall tithes; as ſaffron, woad, flax, hops, tobacco. As to clover ſeed, there doth not appear to have been any expreſs determination in this point: but it is a ſeed; and all ſeeds are mentioned as ſmall tithes. It is true, that clover graſs made into hay is of the nature of all other graſs made into hay, and conſequently muſt belong to the parſon, or other who is intitled to tithe hay; but it does not follow, when it ſtands for ſeed, and is not made into hay, that the ſeed may not be ſmall tithes. Rape ſeed, carraway ſeed, turnep ſeed, muſtard ſeed, are ſmall tithes; but if the herb be growing with other graſs and made into hay, it would be great tithe. And all the barons agreed in opinion, that the plaintiff's bill ſhould be diſmiſſed: baron Parker ſeemed to doubt, as it partook of the nature of the ſtalk, from whence it was taken. Comyns. 633.

And it hath been decreed, ſince this caſe, that the ſeed of clover is a ſmall tithe. Bunb. 344.

A modus may extend to clover, altho' of late only brought into England, if the modus be ſuch as covers all tithes of hay. Bunb. 20.

Coal. This is one of the things which lord Coke exempts from payment of tithes, as being of the ſubſtance of the earth, and not annual; and therefore tithe being due only by cuſtom, a prohibition hath been granted to ſtay ſuit for it in the ſpiritual court; once, 13 Jac. 1. and again 18, 19 Car. 2. Gibs. Cod. 678. 2 Inſt. 651. 3 Bulſt. 114. 2 Keb. 177.

Colts. Theſe are tithable, in the ſame manner as calves; which ſee before. There is in the regiſter, a conſultation, among other things, *de pullanis provenientibus de equitio ſuo.* Gibs. Cod. 678. Reg. 49.

And

And generally, the *time* of payment of the tithe of calves, colts, kids, pigs, and ſuch like young cattle, is when they are ſo old that they may be weaned, and live without the dam upon the ſame food that the dam eateth; unleſs the cuſtom of the place confine the payment to any certain time or age. Deg. p. 2. c. 6.

Upon this head, the books generally ſay, that conies, tho' the property of particular perſons, for the ſtealing of which an action lays, yet being *feræ Naturâ*, are not tithable of common right, and that therefore when they are ſued for, it muſt be upon the foot of cuſtom; for which reaſon, prohibition hath generally gone. But in the caſe of *Jones* and *Gaſtrel*, it was ſaid by *Doderidge*, and agreed to by the court, that tithe ought to be paid of conies; by which general expreſſion, they muſt mean, *of common right*. Gibs. Cod. 678. 2 Rol. 458. 1 Keb. 602. 2 Keb. 141, 452. Conies.

It hath been ſaid, that the diſtinction in this caſe, is, that conies *ſpent in the houſe* ſhall not pay tithe, but ſuch as are ſold ſhall pay; which diſtinction I find frequently uſed in the caſe of pidgeons, but it hath not, I think, been directly applied to conies; tho' it may be ſo applied with as good or better reaſon, conſidering the great profits which uſually ariſe to the owners, from warrens Gibs. 679.

In the caſe of *Walton* and *Tryon*, 1751, a bill was brought by the plaintiff (amongſt other things) for the tithe of rabbits, in a warren called Aſhurſt's warren. And he proved by the former incumbent's book, that the ſame had been compounded for, by payment of twenty ſhillings in money, and four couple of rabbits. For the plaintiff it was argued, that it is a great queſtion, whether this be a predial, mixt, or perſonal tithe. Cuſtomary tithes are generally deemed perſonal tithes;

and if ſo, then a payment in lieu of tithes will be good. Rabbits are of that nature, that they are difficult for the parſon to get them, the times of taking them uncertain, and therefore a ſmall compoſition probably was taken for them. Suppoſe a compoſition was made for hay, originally at 5l. and afterwards a new agreement was made for 4l. and one load of hay: this would be good, and an aſſumpſit would lie. The parſon's book proves, that ſeveral couples were paid, and money alſo; and that book is always held to be good evidence.—For the defendant, it was anſwered, that this tithe can only depend on a cuſtomary immemorial right; and ſo ought to be laid in the bill. Here it is laid, to the tenth of the rabbits in kind; and the plaintiff demands it as ſuch. But his evidence is directly contrary. For by that he proves a compoſition in lieu of tithes for them. Therefore, as his evidence contradicts his manner of laying his preſcription, he muſt fail in his ſuit. As to the rector's book in this caſe it is very modern; for it goes no further back than the year 1728. This indeed may be evidence of payment, but it can never be admitted as an evidence to ſupport the right. By the lord chancellor Hardwicke: the plaintiff by his bill demands tithes in kind, but there is no evidence of that. The evidence offered is, that four couple of rabbits have always been ſent and delivered at the parſon's houſe by the warrener, and twenty ſhillings a year paid, and ſo proved by the former incumbent's book. And the argument by the plaintiff from this evidence is, that this is a compoſition for tithes in kind, and rightly argued, for the modus would be too rank. But the great thing with me is, this twenty ſhillings a year. For the four couple of rabbits can neither be modus nor compoſition. Indeed, payment of part of a thing in money, and part in kind,

has

has been held to be good. But I can determine nothing on this queſtion: but it muſt go to be tried as to the cuſtom. 2 B. E. L. 434.

Copper-mill. See *Mill.*

Cuſtom. See page 29 to 48.

Deer. Theſe are ranked by my lord Coke among the things that are *feræ Naturâ*, and therefore not tithable, without ſpecial cuſtom. And this continues to be the current doctrine; notwithſtanding the large tracts of land taken up by them, (which might otherwiſe yield great profit to incumbents,) and the difficulty the law makes in avoiding the modus, when ſuch tracts come to be *diſparked.* Gibs. 679. See *Park.*

Dotards. Dotards, or old decayed trees, having been once privileged, as *Sylva cædua*, ſhall not pay tithes, tho' afterwards they become rotten, and are cut down for the fire: and yet it is certain, the foundation of the privilege, (viz. their uſefulneſs in the way of timber) is gone; and ſo the privilege, if it ſubſiſt at all, muſt ſubſiſt without foundation; and tho' *More* reports the caſe as clearly determined, *Coke* ſays the court was divided. Gibs. 679. Mo. 908. 2 Cro. 101.

Doves. Theſe being kept in a Dove houſe, may pay tithe, by cuſtom. Gibs. 679. 1 Vent. 5.

Eggs. It was ajdudged, 14 Jac. 1. in the caſe of *Lee* and *Collins*, that the paying 30 eggs in lent, is a good modus for all tithes of eggs. But the general rule is, that where tithe is not paid of chicken, there it is due of eggs; and the modus juſt now mentioned, ſeems to croſs the rule of the law, that every modus ought to be ſomewhat (as to kind) different from the thing that is due. If a certain number of ſheaves, for all corn; or a load of hay for all hay, is ill; it ſeems by no means clear, how thirty eggs for all eggs can be good; allowing them to be things that are *de jure* tithable, which is not denied. But the diſtinction here

taken is, that the thirty eggs are to be paid whether he has hens or no, and alſo are to be paid at a certain time; and ſo that payment, in the manner of it, differs from the payment of the tithe. 1 Rol. Abr. 648. 2 Salk. 656.

Elm. This is agreed on all hands to be timber, and within the privilege of *Sylva cædua*, or wood of twenty years growth, ſo as to pay no tithe, if it be of or above twenty year's growth. Gibs. Cod. 679. See *Wood*.

Fallow. It was held, 7 Jac. 1. in Smith's caſe, that if the parſon hath had tithe-corn one year, and the land lies fallow, without ſowing, the next year, in order to be ready for plowing or ſowing the third year; that the parſon ſhall not have tithe for the ſecond year: and a very good reaſon is given for it, becauſe its lying fallow meliorates the land, and gives the parſon a larger tithe, the third year. Gibs. Cod. 679. 1 Rol. Abr. 642.

But in the next reign, 15 Car. 1. it was ſaid by Barkley, juſtice, that if the occupier of the land will not plow and manure tithable lands, thereby to prejudice the parſon; in ſuch caſe, the parſon may ſue in the eccleſiaſtical court to have tithes of that land, which is a juſt and reaſonable conceſſion; but ſuch is the difficulty of proving intentions, that, in reality, it amounts to little. Gibs. Cod. 676.

Fenns. Theſe, being drained, ſhall not be privileged for the firſt ſeven years, under the name of *barren-land*. Gibs .Cod. 679. See page 13 to 18.

Ferns See *Heath*.

Fiſh. This tithe hath been declared, in its nature, to be perſonal; and therefore not to be taken in kind (or by every tenth fiſh,) but by a juſt conſideration in money, *deductis expenſis*; as was affirmed in the caſe of Goſlin and Harding, 14 Car. 1 Upon which foundation, it was ſaid by Doderidge, that if the owners of a ſhip do lend it to mariners

to

to go to an iſland for fiſh, and are in conſideration of ſuch loan, to have a certain quantity of fiſh when they come back; no tithe ſhall be paid by the mariners for what is given to the owners, becauſe they are only to pay for the *clear gain*. But, by cuſtom, fiſh may be payable in *kind*, (though leſs than the tenth will do, becauſe not *de jure* tithable,) as was adjudged (1. Jac. 1.) in the caſe of *tithe pilchards*, where the tithe of one moiety (in kind, as I ſuppoſe,) was declared a good cuſtom for the whole; and of other fiſh at *Yarmouth*, where the owner's part was to be firſt ſeparated, then the reſt divided into ten doles, and the tenth dole to be divided between the parſon and the town; and in the caſe of Sheppard and Penroſe, where the payment of the twentieth fiſh was adjudged to be good. Gibs. Cod. 679, 1 Rol. Abr. 656, 1 Lev. 179.

It is ſaid that no tithe can be demanded of fiſh caught in the ſea, becauſe they are in no certain pariſh; which diſtinction cannot be meant of *taking tithe in kind*, becauſe that is as expreſsly denied of fiſh in *rivers*, that they are tithable *de jure*, though within the precincts of certain pariſhes, and taken by one who hath a particular *fiſhery*: and therefore as the *ground* of the exemption in both, ſeems to be one and the ſame (viz. that fiſh are *feræ naturâ*, and not tithable *de jure*, but upon the foot of *cuſtom* only,) ſo, with regard to the *perſonal tithe* that is due, it ſeems to make no difference that fiſh at ſea are in *no pariſh*, as long as the fiſhermen *dwells* and *lands* in a *pariſh*. Gibs. Cod. 679. 3 Cro. 339.

In the caſe of the earl of *Deſmond*, where fiſh in a river are declared not to be tithable *de jure*, the river is deſcribed under the particular circumſtance of a *common river*, and *not encloſed*; which ſhews, that it was then thought, that fiſh in *ponds*, and in *rivers encloſed*, and *not common*, were not to be

be reckoned *feræ naturâ*, but to be *de jure* tithable; and that then being the *property* of particular perſons, who had the benefit of them, was a good reaſon why they ſhould be tithed. Gibs. Cod. 679, 1 Rol. Abr. 636.

Flax. This was adjudged to be a *ſmall* tithe, 14 Car. 1, in *Noah Welb's* caſe; and in the caſe of *Wharton* and *Liſle*, 5 Will. and M. was declared to continue ſo, notwithſtanding its being ſown in large fields. Gibs. Cod. 680, 1 Rol. Abr. 637, 2 Lev. 365, Skin. 341, 356, Carth. 263. See *Hemp*.

Foreſt. As lands which are in no pariſh, pay tithes to the crown, ſo lands lying within the precinct of a foreſt, (tho' alſo in a pariſh,) if in the hands of the king, do pay no tithes. But if a foreſt be *diſafforiſted*, and within a pariſh, it ſhall pay tithes; becauſe the not paying tythes, in the hands of the king, was an immunity for *that time only*, while it remained a place for *deer*; and was in the hands of a perſon, who might preſcribe *de non decimando*. Accordingly, in the caſe of *Comins* it was expreſly declared by the court, "That a foreſt in the hands "of a *ſubject*, ſhall pay tithes." Gibs. 680. Sty. 137. 1 Rol. Abr. 655. Hetl. 60.

Fowls. Under this name, are commonly underſtood, *hens*, *geeſe*, *ducks*, and *turkies*; and tho' the laſt of theſe have been declared *feræ naturâ*, and not tithable, (for what reaſon, is not ſaid;) yet no queſtion hath ever been made concerning the other three, but that they are to pay tithes, either in *eggs*, or in the *young*, (according to cuſtom;) but not in both. Gibs. Cod. 680. Mo. 599. 1 Rol. Abr. 642.

It is ſaid to have been adjudged 15 Car. 1. that if a fowler kill fowl, and make profit of them, he ſhall pay a *perſonal* tithe. Gibs. Cod. 680.

ruit. This comprehends *apples*, *pears*, *plumbs*, *cherries*, and the like; concerning which there is no queſtion, but that, when gathered, tithe in kind is due.

But

But as to fruit-trees, my lord *Coke* ſays, that if they have paid tithe-fruit, and be cut down, and ſold in billet or faggot, they ſhall not pay tithe, *for the fruit and tree be not of ſeveral kinds*: but in the mean time, it is certain, that they yield *profits* of ſeveral kinds; and in theſe caſes, the profit to the owner, is the foundation of tithe to the parſon. Gibs. Cod. 680. 2 Inſt. 652.

Fuel. It was adjudged in the caſe of *Auſtin and Lucas*, that no tithe ſhall be paid for fuel, of any kind, that is ſpent in the pariſhioners own houſes. Gibs. Cod. 680. 1 Cro. 609. Mo. 909.

Furzes. If the defendant in ſuit for *furzes*, keeps houſe of huſbandry, and makes it appear that he uſed the *furzes* for fuel, or to make *pens* for his ſheep, no tithe ſhall be paid: but otherwiſe, if ſold. Gibs. Cod. 680. 1 Mod. 609. 3 Keb. 635. Littl. 367.

Gardens. Out of gardens, is paid tithe of all garden-herbs and plants, as *parſley*, *ſage*, *cabbage*, *turneps*, *ſaffron*, *woad*, and the like, which are ſmall tithes, and may be demanded in kind; but, ordinarily, ſome certain conſideration is paid for theſe things, either by cuſtom, or by agreement with the parſon. If the cuſtom be a parochial cuſtom, or extending to gardens throughout the pariſh, the enlargement of a garden doth not make tithe due *in ſpecie*; but otherwiſe, if it was a ſpecial preſcription for this or that garden. And the ſame thing is to be ſaid of *orchards*. Gibs. Cod. 680.

Geeſe. Beſides what hath been ſaid of the tithe of geeſe, under the title of fowl, (which ſee;) we find that the feathers of old geeſe ſheered, and young, were libelled for; and to obtain prohibition, a modus was ſuggeſted, that a young gooſe with the feathers, was paid the firſt of Auguſt yearly, in full of tithe of all geeſe and feathers. And geeſe being *de jure* tithable, and this maxim (that a modus ſhall be ſomewhat different from the thing,

thing, of which tithe is to be paid) being alſo eſtabliſhed, a remarkable expedient was hit on, that the keeping of a gooſe feathered till the firſt of Auguſt, was more than the pariſhioner was bound to by law: upon which, prohibition was granted. Gibs. Cod. 680. 3 Keb. 705.

Glaſs-houſe. It was reſolved, 5 Car. 1. that a glaſs-houſe, the profit of which grows by the labour and induſtry of man, ſhall not pay tithe in kind. Gibs. Cod. 680. Littl. 314.

Graſs. Divers things as to graſs ſtanding, have been ſaid under the tithe of agiſtment; but with relation to graſs mowed, this may be added, which was reſolved, 9 Car. 1. in the caſe of Crawley and Wells, that if one cut down graſs, and while it is in ſwaithes before he makes it into hay, carry it away, and give it to his labouring cattle, (not having ſufficient ſuſtenance for them, otherwiſe;) no tithe ſhall be paid of it. Which is expreſly againſt the common law of the church, as delivered by *Lyndwood: De herbâ viridi, etiam non ſiccatâ, ſi ſic ſumatur vel neceſſaria ſit ad pabulum animalium vel beſtiarum, ſolvenda eſt decima.*

And (to mention a caſe ſomewhat like this) when the inhabitants of divers marſhes and fenny lands, who uſed to gather a rough hay, called fenny-fodder, for want of ſufficient graſs to ſuſtain their beaſts in winter, alledged that they did this for the ſuſtenance of their beaſts, and the better increaſe of their huſbandry, and ought therefore to be freed from the payment of tithes; the court held, "that "this ſurmiſe was not ſufficient; for one may not "preſcribe in *non decimando*: and in that it is al-"ledged, they beſtow it upon their cattle there, "that is not any cauſe of diſcharge; ſo they may "preſcribe for corn ſpent in their family, or for corn "given for provender to their cattle; whereby no "tithes ſhould be paid." Gibs. 680. 2 Inſt. 651. 1 Mod. Rep. 35.

This

This is one of the things, which are exempted by the general rule, as being of the ſubſtance of the earth; according to the maxim of my lord Coke, and alſo a latter reſolution. Ann, 21 & 22. Car. 2. Gibs. 680. Gravel.

The tithe of haſle, holly, willow, whitethorn, &c. being ſued for in the ſpiritual court, prohibition was moved, and (as it ſeems) obtained, upon theſe ſuggeſtions, that they were of twenty years growth and more, and, by the common cuſtom of the place, were uſed for timber to build and repair their ploughs. Gibs. Cod. 680. Noy 31. Haſle.

Modus's have been pleaded for diſcharge of payment of all tithe for hay, in conſideration of one or more loads of hay; and when it hath been objected, that this, being a recompence of the ſame kind, could not be a good modus; they alledged further, that the owner had not only cut down the parſon's ſhare, and ſet it out in graſs cocks, but had alſo made it into hay for him, which was more than by law he was bound to do; and that, in conſideration of his labour, he ought to be diſcharged; in which caſe, 13 Jac. 1. the modus was denied by Coke and the other juſtices, becauſe the making it into hay was no more than what by law he was bound to do. Accordingly, the thing which the antient conſtitutions of the church of England make payable to the parſon, is *decimæ de fœnis*, not *de gramine*; and Lyndwood upon the place, at the ſame time that he ſays, the word *fœnum* may be extended to graſs (to make graſs, that is ſo carried away for the preſent ſuſtenance of cattle, a thing tithable, within that conſtitution,) makes *herbam ſiccatam* to be the ordinary conſtruction of the word *fœnum*. And if we ſuppoſe the ſetting out in graſs to be the common law of tithing, it is wonderful that we ſhould meet with no remains of that way, in our ſtatutes, or conſtitutions, or even in common ſpeech, but that the current Hay.

current language ſhould have always been, what it ſtill continues, *decimæ de fœnis*, tithe of hay, or tithe out of hay. Gibs. Cod. 680, 681. 1 Rol. Abr. 644. Hetl. 147. See Cattle.

However, in ſeveral caſes, where this point of tithe-hay, and of aftermaths, hath come in queſtion, it hath been held, that the owner is not bound to make it into hay unleſs the cuſtom of the place oblige him to it: but that, of common right, and cuſtom apart, it is ſufficient if it be ſet into graſs cocks, and (ſo tithed) be left wholly to the care of the parſon; and that therefore the owner's making it into hay, may be a good foundation of diſcharge. And in the caſe of Hide and Ellis, the court went further, and declared, that if the cuſtom was to meaſure out the tenth acre of graſs for tithe, it would be a good cuſtom, and the parſon ſhould mow it, &c. at his own charge. Gibs. Cod. 681. 2 P Will. 523. Hob. 250. See Aftermath.

But where the pariſhioner is not obliged by cuſtom to make the tithe into hay, the parſon, of common right, and without alledging a cuſtom, may make his graſs into hay upon the land on which it grew, and may for that end paſs over the pariſhioners ground, by the common path. Gibs. Cod. 681. 1 Rol. Abr. 643.

The finding ſtraw for the body of the church, is no diſcharge from tithe-hay, becauſe it is no advantage to the parſon, who is not charged with the repairs of the church; as was declared in the caſe of Scory and Baker. But what is further ſaid in that caſe, ſeems ſomewhat ſtrange, (viz. that if he had alledged that the parſon had a ſeat in the body of the church, the preſcription would have been good;) ſince the conſideration upon which the parſon is diſcharged from contributing to the repairs of the church, is his repairing of the chancel;

cel; without regard to his place of ſitting, either in church or chancel. Gibs. Cod 681.

But a meadow in the pariſh, which had been ſeiſed time out of mind by the parſon and his predeceſſors, was adjudged a good conſideration for the pariſhioners to be diſcharged of tithe hay; for it ſhall be intended, that it was originally given on that account. Gibs. Cod. 681. 1 Rol. Abr. 649.

Of hay mown to feed deer, tithes are due of common right; and ſhall be paid: unleſs there be a cuſtom to the contrary. Gibs. Cod. 681. 2 Keb. 25.

In the caſe of Selby *verſus* Clarke, a cuſtom was ſuggeſted within the pariſh, that if any pariſhioner fed his ſheep with his graſs until June and Auguſt, he might mow the coarſe graſs with which they feed their ſheep in the winter, whereby the parſon had *uberiores decimas* of the ſheep. Againſt which it was alledged, that it was plain *non-decimando*; and the court held it to be a void cuſtom. Gibs. Cod. 681. 1 Lord Raym. 677.

Ann. 39 Eliz. it was judged a good diſcharge from the tithe of hay upon the head land, that the owner reaped, bound, and ſhocked the corn; on ſuppoſition, that the tenth ridge is the thing due for the tithe, and that the labour of the owner about the corn (to which he was not bound) was a good foundation of ſuch diſcharge. Gibs. Cod. 681. 2 Leon. p. 70. Head-lands.

And 10 Car. 1. a cuſtom for head lands, ſown with corn to be diſcharged of tithes, becauſe fed with plough-cattle, or mowed and cut for that purpoſe, was adjudged a good cuſtom. Gibs. Cod. 681.

Ann. 22 Car. 2. Where it was alledged, that heath and fern were not tithable, prohibition was granted, but whether upon that part of the ſuggeſtion Heath.

ſuggeſtion, appears not. And, long before, viz. 28, 29 Eliz. the opinion of *Suit* juſtice was, that if they have paid tithe-wool, milk, calves, &c. for their cattle, which have gone upon the land, they ſhould not pay tithe of heath, turf and broom. Gibs. Cod. 681. 3 Keb. 635. Godb. 44.

Of hay growing upon land that was heath ground, it was ſaid by Richardſon, 5 Car. 1. that if it be mere waſte-ground, and yield nothing, it is excuſed by the ſtatute, for ſeven years: but if ſheep were kept upon it, or if it yielded any profit, which yielded tithe, then tithe ought to be paid. Gibs. 681. Hetl. 145. See page 13, 14, 15.

Hedge-poles. In Lane's caſe, 14 Jac. 1. Where the ſuit was in court-chriſtian for tithe of wood under twenty years, the defendant alledged, that he had employed the wood in hedge-poles for meliorating his coppices, and that he had not been uſed to pay tithe of hedge-poles, and prohibition was awarded. Gibs. Cod. 681. Mo. 917.

Hemp. The tithe of hemp and flax is now aſcertained at five ſhillings per acre, by Stat. 11 & 12 W. 3. c. 16. which enacts as followeth: "Whereas the ſowing of hemp and flax is and would be exceeding beneficial to England, by reaſon of the multitude of people that are and would be employed in the manufacturing of thoſe two materials, and therefore do juſtly deſerve great encouragement; and whereas the manner of tithing hemp and flax is exceeding difficult, creating thereby chargeable and vexatious ſuits and animoſities, between parſons, vicars, impropriators and their pariſhioners; for remedying whereof, it is enacted, that every perſon who ſhall ſow any hemp or flax, ſhall pay to the parſon, vicar, or impropriator yearly, the ſum of five ſhillings, and no more, for each acre of hemp and flax ſo ſown, before the ſame be carried off the ground, and ſo proportionably

proportionably for more or leſs ground ſo ſown: for the recovery of which ſum or ſums, the parſon, vicar or impropriator ſhall have the common and uſual remedy allowed of by the laws of this land."

Sect. 2. "Provided, that this ſhall not extend to charge any lands diſcharged by any *modus decimandi*, ancient compoſition, or otherwiſe diſcharged of tithes by law."

See *Agiſtment*.

Herbage.

Tithe of holly ſhall be paid; tho' above twenty years growth; but when it was ſuggeſted, that by reaſon of ſcarcity of timber in a particular county, they uſed it as timber to build and repair their ploughs, there prohibition was awarded. Gibs. Cod. 681. 2 Cro. 199. Noy 30.

Holly.

A conſultation is provided in the regiſter: *de decimâ mellis & ceræ provenientium de apibus & alveis apium:* and in the caſe of Barefoot and Norton, 11 Car. 1. it was reſolved, that tithe of honey and wax ought to be paid in kind, *de jure*; and it is accounted a predial tithe. Gibs. Cod. 681. Reg. 48. 3 Cro. 529. Jones (W.) 447.

Honey.

Concerning hops, four things have been under conſideration.

Hops.

1. *What kind of tithe they are?* And as to that, there was a caſe 3 Jac. 1. between Portman, a knight, and another, in which the queſtion was for hops in Kent; and adjudged, that they were great tithes; but as for hops in orchards or gardens, theſe were reſolved to belong to the vicar, as *minutæ decimæ*. Gibs. 681. Hutt. 78.

Hops pay a predial tithe; and regularly are accounted among ſmall tithes. God. 414.

Thus in the caſe of *Franklyn* and the maſter and brethren of St. *Croſs*, T. 1721; the vicar being endowed of ſmall tithes, it was decreed, that he was thereby entitled to hops, being a ſmall tithe, tho' of growth ſince the endowment. Bunb. 79.

2. Whether a modus may be pleaded, to be diſcharged of tithe of hops? And in the caſe of Crouch and Riſden, 21, & 22. Car 2. Where the ſuggeſtion was, that they had paid ſo much an acre for tithe-hops, time out of mind; the court denied a prohibition, becauſe hops in England (whether brought in during the reign of Hen. 8. or of Queen Elizabeth,) were much later than the time of memory; and therefore no preſcription could be pleaded; but it was ſaid, in the ſame caſe, that if the ſuggeſtion had been, that ſo much had been paid in lieu of all ſmall tithes, prohibition would have gone, becauſe hops, woad and ſuch little things of novel invention, are ſmall tithes (which, by the way, doth not contradict the firſt poſition, becauſe, when the court called them little things, it is plain they intended ſuch hops only as grow in ſmall quantities, in orchards or gardens.) Not unlike the caſe of Alfrey and Mill, (4 Car 1.) where the ſurmiſe for a prohibition was, that the hops grew in a garden, and that the cuſtom was for every garden to pay 1d. &c. and that the modus was held to be good, if they did not grow in any new addition to the garden. Gibs. 682. There can be no modus for tithe hops, becauſe the court will take notice, that hops have not been ancient, but uſed in beer of late times only, being firſt introduced into England about the year 1524, yet a preſcription to pay ſo much in lieu of all ſmall tithes, may include hops and other ſuch ſmall things which have come in uſe of late years. Watſ. c. 49. Bunb. 20.

3. *In what manner tithe of hops is to be ſet out?* of which, it was ſaid by Twiſden, (a Kentiſh man) in the forecited caſe of Crouch and Riſden, that to that day it was a queſtion how hops ought to be tithed, whether by the hill, or by the pole, or by the buſhel; but, in the caſe of Ledgar and Langly

Langly, what he ſaid upon the ſame head, s thus expreſſed, whether, by the tenth pole, or by meaſure; but Keling ſaid they were payable by the pole. Gibs. Cod. 682. Siden. 443. 2. Keb. 36.

Tithes of hops are not to be paid till after they are picked, and before they are dried; every tenth meaſure. Bunb. 20.

In a late caſe, Mr. *Chandler*, painter at Maidſtone in Kent, having ſet forth the tithe of his hops by the tenth pole unpicked, Mr. *Bliſs*, the impropriator, brought this matter before the court of Exchequer; where, after long debate of counſel on both ſides, and reading three former decrees, the court again declared this method of ſetting forth to be illegal. 2 B. E. L. 419.

And, finally, in the caſe of *Walton* and *Tyers*, May, 17, 1753. Mr. Tyers having planted a conſiderable number of acres with hops, in the pariſhes of Mickleham and Darking in Surrey, of both which pariſhes, Mr. Walton was incumbent, offered to pay to him after the rate of 20s. an acre for the tithe thereof; which Mr. Walton refuſed. Whereupon Mr. Tyers gave him notice, that on ſuch a day he would begin to gather his hops, and would regularly ſet out every tenth hill thro' all his hop plantations as the tithe thereof, by ſevering the bind of the hops from the ſoil, and leaving the ſame on the poles; and that he would in the ſame manner daily ſet out the tithe of his hops, in order that Mr. Walton's agent might be preſent at the reſpective times of ſetting out the tithe, and might carry away the ſame in due time. Mr. Walton ſaid, that this method of tithing was new and contrary to law, and that he would not take the tithe in that manner; but that he expected the whole crop ſhould be gathered, and afterwards meaſured in baſkets, and that every tenth baſket of hops, after being ſo meaſured,

ſhould be ſet out for the tithe thereof. This Mr. Tyers refuſed to do, and proceeded according to his notice to ſet out the tithe in the manner above mentioned; leaving every tenth hill ungathered, having cut or ſevered from the ſoil the binds or ſtems on which the hops on every ſuch tenth hill grew; and renewed his notice daily whilſt his hop gathering continued. Mr. Walton did not meddle with the tithe ſo ſet out; and after the hops had continued for ſome months upon the poles on every tenth hill as aforeſaid ungathered, and ſo became ſpoiled and rotted, Mr. Tyers brought an action for damages againſt Mr. Walton, for as much as he was thereby hindred from dreſſing and cultivating his hop plantations. Upon this, Mr. Walton filed his bill in the Exchequer againſt Mr. Tyers, thereby inſiſting, that the manner in which Mr. Tyers had ſet out the tithe of his hops, by leaving the hops on every tenth hill, and ſevering the binds from the ſoil, was not a proper method for ſetting out ſuch tithes; but that the tithe of hops ought by law to be ſet out after the ſame are picked from the bind or ſtem. And, on hearing, the court declared, that the method of tithing hops inſiſted on by the defendant in his anſwer, is not a good ſetting out of tithe of hops; but that hops ought to be picked and gathered from the binds, before they are tithable. Mr. Tyers appealed to the houſe of Lords; ſetting forth, that the manner of ſetting out the tithes by the admeaſurement of the hops in baſkets, would be very prejudicial and inconvenient to both parties, as the hops by that means would be neceſſarily bruiſed, the flower and condition thereof hurt, and the hops thereby very much damaged; that it hath been uſual, of late years, for hop planters to direct their gatherers to pick or aſſort their hops into different pokes, according to their different degrees of fineneſs and colour,

to

to wit, the *fine*, and the *brown*; and ſuch aſſortment is the moſt material and expenſive part of the manufacturing of hops, thrice as much time and expence being required in picking and aſſorting hops into two different parcels, as is neceſſary in picking them into one poke when firſt gathered; and that it is unreaſonable, that perſons claiming tithes ſhould have the benefit of this part of the manufacture of hops, which coſts about 5l. an acre, without making any allowance, or contributing any ſhare to the expence; and praying relief, for theſe (amongſt other reaſons:) Firſt, there is no poſitive law, to regulate the manner of tithing hops; neither is it fixed by immemorial uſage or cuſtom; the determination of courts relating thereto have been various; and therefore that manner of tithing ſeems moſt juſt and aquitable, which is both the leaſt prejudicial to the owner, and moſt beneficial to the parſon or impropriator. Secondly, the manner inſiſted on by the reſpondent, by picking and then ſetting out the tithes by admeaſurement in baſkets, is ſo very detrimental to the planter, that it muſt inevitably be the ruin of the plantation of hops, the cultivation whereof is of extenſive benefit to this kingdom: the method inſiſted on by the appellant is undeniably fair and equitable, not liable to any fraud whatſoever; whereas the method inſiſted on by the reſpondent is avowedly oppreſſive and injurious, in no wiſe productive of any benefit, or preventive of any fraud.—Mr. Walton, the reſpondent, hoped the decree would be affirmed, (amongſt other reaſons) for theſe following, Firſt, the ſetting out the tithe of hops by meaſure, after they are picked from the bind or ſtem, is the faireſt and moſt equal method, and liable to the leaſt inconvenience; whereas the method of tithing contended for by the appellant, by every tenth hill, would be liable

to great fraud, inaſmuch as the planter of hops would have a right to ſet out for tithe every tenth hill, to be computed from the place he began at; and he might any year determine before he manured his hop-ground, where he would begin to ſet out the tithe, and thereby would certainly know every tenth hill through the whole plantation; and might neglect to manure or improve them ſo much as the other hills, which would be unjuſt and unreaſonable. Secondly, the method of tithing contended for by the appellant, would give occaſion to many diſputes and controverſies; as the hops growing on one hill, are apt naturally to intermix with the hops growing on the hills adjoining, ſo that it is ſcarce poſſible to ſever the one from the other intire; and the owner of tithes, or his agents, or ſervants, exerciſing the right of entering into the hop-grounds, and pulling up the planter's poles, muſt frequently furniſh matter for ſuits and vexations; which would be inconvenient both to the owner of the tithes, and the pariſhioners. Thirdly, the appellant hath not made the leaſt proof, that the tithe of hops was ever ſet out before they were picked from the bind or ſtem, or that they were tithed by the tenth hill, (which is the method of tithing he contends for;) but on the contrary, in many inſtances, where the method of ſetting out the tithe-hops has been diſputed or brought in queſtion, it has been uniformly determined and adjudged, after ſolemn argument, that the tithe of hops by law ought to be ſet out by meaſure, after they are picked from the bind or ſtem.—And the decree was affirmed by the lords, 2 B. c. L. 419.

4. *At what time, the tithe of hops is to be ſet out.* Upon which head, Rolle ſays, that in the caſe of Barham and Gooſe, 14 Jac 1. it was affirmed by Serjeant Hitcham, and agreed to by Mountacute, that one may ſet out the tenth part of hops for tithe,

tithe, *before* they are dried. Gibs. 682. 1 Rol. Abr. 644.

For a ſaddle horſe, that is kept for pleaſure, tithe of agiſtment ſhall not be paid, becauſe by it no profit comes in; but (as the caſe of Pothill and May is reported by Bulſtrode,) it ſhall be paid for working-horſes for the cart or plough: though that is contrary to the eſtabliſhed rules of law in this caſe, which are recited under the title Agiſtment; and alſo contrary to the caſe of Bill and Tarde, 15 Jac. 1. and is not to be reconciled, but by confining the agiſtment of labouring horſes, to labour about ſuch things, as are profitable to the owner, and of no profit to the parſon. 1 Bulſtr. 171. Poph. 126. 1 Rol. Abr. 646. Gibs. 682. Horſes.

But if horſes are kept for ſale, and are ſold, or if they be the horſes of travellers, or others, taken in as gueſt-horſes, in theſe caſes, it is agreed by all, that tithe of agiſtment is due; becauſe a profit ariſes from them. Gibs. 682. 1 Rol. Abr. 647. 1 Bulſt. 171. Hard. 95. Poph. 142.

De jure Communi, no tithe ought to be paid of houſes of habitation, becauſe they do not grow and renew by the year; but, though no tithe is payable *de jure*, yet if, time out of mind, a *modus decimandi* hath been paid for houſes, it may be recovered in the eccleſiaſtical court, in the nature of tithe, and the law will ſuppoſe that it was, originally, in lieu of the tithes of the land upon which the houſes are built; and, becauſe it might have a lawful beginning, and hath been time out of mind, it ſhall continue. Gibs. Cod. 682. 11 Rep. 16. a. Hob. 10. Houſes.

For the law of tithe for houſes in *London*, ſee Chap. 7.

This is a *ſmall* tithe, as was agreed 15 Jac. 1. and before that, viz. 39, 40 Eliz. (as Noy alledged in the caſe of Ward and Britten,) a vicarage appearing to be endowed of ſmall tithes, it Lamb.

was reſolved in the Exchequer, upon conference with civilians, that lambs were included as ſmall tithes. But, in the foreſaid place, Bridgman cites a reſolution in the caſe of Sharman and Beadles (40, 41 Eliz.) that an action of debt lies upon the ſtat. 2 Ed. 6. for tithe lambs; from which he infers, that they muſt be a great tithe, and alſo a predial tithe; ſince none but ſuch are included in that part of the ſtatute: but, I think, generally, they are reckoned a mixt, *ſmall* tythe. Gibs. 682. Poph. 144. Palm. 219.

As to the manner of tithing lambs, where the number is under ten, it is the ſame with the manner of tithing calves in the like caſe: (which ſee under that title;) and if the parſon inſiſts upon it, that he will wait till next year, that they may come up to the tithable number; or if the lambs belonging to the ſeveral owners are put together, to be tithed jointly; in both caſes prohibition will lie: in the firſt caſe, becauſe it is againſt the nature of tithe by the common law, which is annual; and in the ſecond, becauſe it is a cuſtom againſt reaſon; for by that means it may fall out, that ſome one may have but one lamb, and that be taken for tithe; and he that had more, ſhould pay nothing at all. Gibs. 682. 3 Cro. 403. Hob. 329.

The firſt of thoſe determinations is contrary to Lyndwood: *Ubi non ſunt plené decem agni, ſic videlicet, ut nec ſeptimo agno recepto pro decimâ, ſi tot ſint, nec pecunia recepta loco decimæ, ubi pauciores ſunt quam ſeptem, expectet uſque ad proximum annum.* Lyndw. de dec. c. *quoniam*, &c.

In the caſe of Selby, *verſus* Clerk, it was delivered by Holt, chief juſtice, that the tenth lamb is due to the parſon by common right; and though they make diſtribution in the eccleſiaſtical courts, that is only among the parſons themſelves, with relation to the places of their feeding throughout the year, but does not concern the proprietor of the

the land, who ought to pay the tenth lamb to the parſon by common law. But this, when paid, could be no foundation of a claim, by way of modus, to be diſcharged of all tithes of the lambs there fed; on which the pretence for a modus was founded. L^d. Raym. 677.

It hath alſo been held, that if a man preſcribe to pay one half-penny for every lamb, that he ſhall ſell before the firſt day of May; and, to deceive the parſon, ſhall ſell all his lambs the day before May-day; this is fraudulent, and the cuſtom ſhall be no diſcharge. Gibs. Cod. 682. 1 Rol. Abr. 652.

In the caſe of *Boys* and *Ellis*, M. 1723. in a bill for tithes, a queſtion aroſe, whether there was fraud in tithing lambs, on this caſe. The ewes were kept by the defendant in the pariſh of Driffield, in the county of York, (where the demand lay,) all the year until Chriſtmaſs, when they were ready to drop their lambs; and then were removed into the pariſh of Skern, (where there was a ſmall modus only for lambs,) and there kept till Lady-day, for convenience of forage; (as inſiſted upon by the defendant) and at Lady-day were brought back to Driffield: note, the land in Skern was the defendant's own land. By the court, here is not a ſufficient proof of fraud: and the plaintiff's bill was diſmiſſed. But Page and Gilbert, barons, thought at firſt, it might be proper to ſend it to an iſſue, to try whether fraud or not fraud, and whether this had been the uſual method of the defendant's courſe of huſbandry; but afterwards they concurred with Baron Price. Bunb. 139. See *Wool*, *Sheep*.

Lattermath. See *Aftermath*.

Lead. This is one of the things which my lord Coke exempts from tithe, as of the *ſubſtance of the earth*, and not annual; and therefore where tithe is claimed, it muſt be upon the foot of cuſtom. 2 Inſt. 651. Gibs. 682.

This

Lime. This alſo is one of the things exempted from tithe, on the ſame account as lead; and therefore, it was reſolved, 13 Jac. 1. in the caſe of Thomas and Perry, that if tithe be demanded of a lime-kiln, it can only be by cuſtom. 1 Rol. Abr. 642. 2 Keb. 596.

Line. See *Flax*.

Loppings. It is agreed by all, that timber trees of the age of twenty years or above, ſhall not pay tithe of loppings: (no not if they be cut every ten or twelve years;) but it hath been made a queſtion, whether ſuch branches, if the trees are lopped before twenty years, ſhall not always pay for loppings after twenty years; inaſmuch as at the firſt lopping, the tree was not priviledged. Upon which head, we find two contrary reſolutions; one reported by Brownlow, in theſe words, "if a man "top a tree under the growth of twenty one years, "and ſuffer the body to grow; and afterwards, "when the boughs are grown out again, he doth "lop and top it again, he ſhall pay no tithes, al-"though the tree was not priviledged at the firſt cut-"ting." The other reſolution is in the caſe of Brook and Rogers, 2 Jac. 1, reported by Moor, in theſe words: "And it was held that if a tree be lopped "before twenty years, and after twenty years, be "lopped every ten or ſeven years, tithe ſhall be "paid of ſuch loppings;" where reference ſeems to be made to ſome like former reſolutions in the reign of queen Elizabeth. Gibs. 682, 683. 2 Cro. 101. Mo. 762, 908. See *Dotards*.

Maple. Tithe of maple ſhall be paid, although it be of twenty years growth, and more. Gibs. 683. 2 Cro. 199.

Maſt. It is ſaid by ſir Simon Degge (upon what authority he doth not add,) that tithe of crabs, maſt, &c. is to be paid, when the ſame are gathered; or ſatisfaction is to be given if eaten with ſwine on the ground. Gibs. 683.

In

In the regiſter there is a conſultation for tithe *de decimâ lacticiniorum*, (which yield a mixed tithe;) and it hath been obſerved before, under the title, cheeſe, that when tithe is paid of cheeſe, it ſhall not be paid of milk; and *vice verſâ*. A certain number of cheeſes, and the tithe of cheeſe from May the firſt to Auguſt the firſt, (pleaded as cuſtom,) have both been adjudged good diſcharges from the payment of tithe milk; for they come of labour, and are not due of themſelves, and therefore are a good diſcharge. But cuſtom of having all the milk ſo many mornings and evenings, from the 9th of May, till a young lamb yeaned ſhould be heard to bleat, in lieu of all tithe of milk, was adjudged ill; not only becauſe it is a payment of part of the very thing, which can never be a good modus, but alſo becauſe of the uncertainty: for it may be that a lamb is heard to bleat before the 9th of May, and then the parſon ſhall have no tithe at all. Gibs. 683. Milk.

In the caſe of *Foy* and *Liſter*, the point was, upon a modus, to pay from April to November the tenth day's milk once ſkimmed, made into cheeſe, in lieu of all tithe of milk; and the reaſoning upon it, was, becauſe of the labour of the pariſhioner, which goes to making the milk into cheeſe; but no determination by the court. Ld. Raym. 1171. Gibs. 683.

As to the circumſtances in the payment of tithe-milk, three things are inquirable; 1. To whom? and that is, to the parſon in whoſe pariſh the cows yielding milk, depaſture for the time. 2. In what manner? and that ſhall be, not by the tenth part of every meal, but by every tenth meal entire. 3. At what place? and that was adjudged to be the church-porch, whither it ſhall be brought by the pariſhioner, as the Chief Baron, and two others held; but Raymond thought it ſhould be delivered at the houſe of the parſon or vicar. Declared *per curiam*,

curiam, that of common right tithe milk is payable at the parſonage or vicarage houſe. Gibs. 683. Raym. (Sir Tho.) 277. Ld. Raym. 129.

The ſame rules that take place as to the milk of cows, do, by parity of reaſon, and according to the laws of the church, hold in the milk of goats and ewes, where it is preſerved: but Rolle ſays, that in the caſe of Sewel and Bicknar, 14 Car. 1. upon ſurmiſe, that it was not the cuſtom of ſuch a county to pay tithe of milk of ewes, prohibition was granted. Gibs. 683. 1 Rol. Abr. 654.

In the caſe of *Scoles*, *verſus Lowther*, where it was pleaded, that cattle for the pail for the uſe of the houſe, ought not to pay tithes, a prohibition to the ſpiritual court was granted, *niſi*, &c. But it appearing afterwards, that the plaintiff carried the milk of theſe cattle to his houſe in another pariſh, and uſed it there, it was reſolved by the whole court, that the defendant ſhould have tithe of the milk. Ld. Raym. 129.

In the caſe of *Dodſon* and *Oliver*, E. 1721; it was decreed, that if there be any cuſtom in a pariſh for the manner of tithing milk, as to carry it to the church porch, or parſonage houſe, that muſt be obſerved by the pariſhioner; but if there be no particular cuſtom or uſage, the pariſhioner is obliged *de jure* to pay every tenth meal, to milk the cows at the uſual place of milking, into his own pails; and the parſon is obliged to fetch it away from the milking place, in his own pails, in a reaſonable time; and if he doth not fetch it before the next milking time, the pariſhioner may juſtify pouring the milk upon the ground, becauſe he hath occaſion for his own pails. And it was determined by the whole court of Exchequer in this caſe, that the milk ought not to be carried either to the church-porch, or to the parſon's houſe, and that it ought to be fetched by the parſon. Bunb. 73.

So

So in the caſe of *Carthew* and *Edwards*, T. 1749; Edward Carthew, clerk, rector of St. Muvan in Cornwall, brought his bill in the Exchequer (amongſt other particulars) for the tithe of milk. The defendant, Edwards, in his anſwer ſet forth, that the plaintiff having declared he would not ſend for or fetch the tithe milk, he did order every tenth meal of his cows to be turned upon the ground; it not being uſual or cuſtomary for the pariſhioners of the ſaid pariſh, to carry their tithe milk home to the rector. The court, upon hearing the cauſe, and ordering two decrees in the ſaid court to be read, wherein *Dodſon* was plaintiff, and *Oliver* defendant, did declare, that the defendant ought to have milked the tenth meal of his cows, in veſſels of his own, at the place and in the manner he milked the other nine meals, and that the plaintiff ought to have fetched it away in his own veſſels. 2 B. E. L. 433.

A cuſtom that every inhabitant in the pariſh, who kept cows there, had uſed time out of mind, to ſet out the whole meal of milk upon the ninth day of May at night, and upon the tenth day of May in the morning, and ſo upon every ninth day then next following, until one lamb (to be yeaned in the year following) ſhould be heard to bleat there, hath been adjudged an unreaſonable cuſtom; becauſe in ſuch caſe it might be contrived that lambs ſhall come ſo ſoon, as to deprive the parſon of the tithe milk for a great part of the year. L. Raym. 358.

Mich. 1731. *Brinklow* and *Edmonds*, a bill was exhibited to eſtabliſh ſeveral modus's in the pariſh of Newton Longville, in the county of Buckingham: one of which was, that tithe milk ought to be paid by every tenth evening and morning's meal in kind; from Hoe Monday to the ſecond day of November, to commence upon the evening of Hoe Monday (that is, the Monday fortnight after Eaſter

Eaſter-day, and the morning following, to be taken by the rector at the place of milking, and no tithe milk to be paid for the reſidue of the year. But by the court, this is void upon the face of it, being only a payment of part for the whole. Bunb. 307.

XIII. With regard to tithing, mills are of two ſorts; either corn-mills, or mills for other uſes, as, paper-mills, fulling-mills, and the like. Corn-mills have been commonly thought to yield a *predial* tithe, viz. the tenth toll diſh; from its belonging to the incumbent where the mill ſtands, and not where the miller dwells; according to the known diſtinction, that *predial* tithes are payable where they ariſe, perſonal where the perſon hears divine ſervice and receives ſacraments; as was argued by my Lord chief Juſtice Holt, 3 Will. & Mar. in the caſe of *Gumley* and *Falkingham*; contrary to the ſuggeſtion of Coke in his commentary upon *articuli cleri*, Cap. 5. where he ſpeaks of ſome, who would have the tithe of corn-mills to be perſonal, as well as the tithe of other mills; and it hath (as I am well informed) been lately ſo adjudged in the houſe of Lords: *i. e.* to be a perſonal tithe; contrary to the determination of Lyndwood: "*Scias, quod fructus provenientes ex* "*molendino decimabuntur tanquam prediales, non* "*deductis expenſis factis in re, circa rem, vel extra* "*rem.*" Gibs. 683. cites Show. 281. Carth. 215. 2 Inſt. 621. Lyndw. de dec.

In the caſe of *Chamberlain verſus Keate*, it was determined by the houſe of *Lords*, that mills are tithable, but that the ſame is a perſonal tithe, and ſo ought to be paid out of the clear gain after all manner of charges and expences deducted. 2 P. Will. 463.

Concerning wind-mills, we find a determination in the canon-law as follows, "*ex tranſmiſſâ querelâ* "*rectoris eccleſiæ de N. intelleximus: & infra. Quia*

"*fidelis*

" *fidelis homo de omnibus, quæ licite poteſt acquirere,*
" *decimas erogare tenetur: mandamus, quatenus H.*
" *militem ad ſolutionem decimarum de his, quæ de*
" *molendino ad ventum perveniunt, ſine diminutione*
" *aliquâ compellatis.*" Gibs. 683.

The canoniſts hold that this is a *predial* tithe, and that the tenth toll diſh ought to be paid for the ſame, without deduction of expences: but this doth not agree with the common law, and therefore is not binding. Deg. p. 2. c. 9.

In the caſe of *Dodſon* and *Oliver*, E. 1721, in the Exchequer; Price and Mountague barons were of opinion, that an ancient corn-mill ought to pay the tenth toll diſh, which being a tenth part of the thing itſelf, was a *predial* tithe, and due of common right: but the chief baron Bury and baron Page, that it is a perſonal tithe, and not due of common right; and the mill not having paid, is now exempt by the ſtatute of the 2 Ed. 6. ſo the court being divided, the plaintiff had no decree. Bunb. 73.

But before this, in the caſe of *Newte* and *Chamberlain*, in the year 1706, it was decreed in the houſe of lords, on an appeal from the court of Exchequer, that the tithes of a mill are perſonal tithes, contrary to ſeveral ſeeming authorities; and that in conſequence of their being perſonal tithes, not the tenth of the toll, or tenth diſh of the corn ground belongs to the parſon, but the tenth part of the clear profits, after the charges of erecting the mill, and the other charges of ſervants, horſes, and other expences are deducted. Vin. Diſmes M. a.

By the ſtatute of the 9 Ed. 2. St. 1 c. 5. *If any do erect in his ground a mill of new, and afterwards the parſon of the ſame place demandeth tithe for the ſame, the king's prohibition ſhall not lie.*

A mill.] This is only meant of a corn mill: for it hath been reſolved, that fulling-mills, tin-mills,

mills, lead-mills, plate-mills, and the like, are not within this ſtatute, nor is tithe due of ſuch otherwiſe than by cuſtom. Gibs. 666.

Of new.] Therefore all corn-mills, not erected before this ſtatute, are tithable. But becauſe many mills ſince erected may be to us ancient, and their firſt erection not known, the rule of their diſcharge ſeemeth to be, that all ſuch mills whoſe firſt erection was before time of memory, and is not otherwiſe known by matter of record, and have not been ſubject to the payment of tithes, ſhall be intended to be erected before the ſtatute, and ſo to be tithe free. But as to mills for which tithes have been paid, and new mills, tithes muſt be paid for them. Boh. 133.

Therefore when prohibitions are moved for to ſtay ſuits for tithes in the eccleſiaſtical courts for ancient mills, it muſt not only be ſuggeſted that the mill is an ancient mill, but alſo that it hath never paid tithes; and the courts of common law do generally require an affidavit to be made of the truth of ſuch ſuggeſtion, to wit, that the mill is ancient, and hath not within memory paid any tithes. Boh. 133.

The king's prohibition ſhall not lie.] Trin. 15 Ja. a prohibition was prayed to the ſpiritual court, upon a ſuggeſtion, that the parſon libelled for tithes of a mill which was erected upon land diſcharged of tithes by the ſtatute of monaſteries 31 H. 8. c. 13. and denied by the whole court: for of a mill erected of new, a prohibition lieth not. Cro. Ja. 429.

If there is a modus in lieu of all tithes iſſuing out of a meſſuage, and an ancient water-mill for corn, and a new water-mill for corn is erected within the ſaid meſſuage; if the ſtream on which an ancient mill ſtood is diverted by the owner (and not by the act of God), and a new mill erected

erected upon the new ſtream; they ſhall not be diſcharged by virtue of any former modus. 1 Roll. Abr. 641.

But if there hath been an ancient corn-mill for which a modus hath been paid for time immemorial, and afterwards by continuance of time, the mill ſtream changeth its courſe, and goeth in a place a little diſtant from the ancient ſtream, and thereupon the owner of the mill pulleth it down, and rebuildeth it in the new place where the ſtream now runneth; this ſhall be diſcharged of tithes by force of the ancient modus, for this cometh by the act of God, and not by the act of the party. 1 Roll. Abr. 641.

So, the addition of a pair of ſtones to an ancient mill, doth not deſtroy the modus. Carth. 215.

But if the ſurmiſe be of a certain rate or modus for all mills erected and to be erected, and a mill there appears to be new; the modus cannot extend to it, by reaſon of the ſtatute aforeſaid. 3 Bulſt. 212.

The mines of coal, and of metals of all kinds, are free from tithe, as being of the ſubſtance of the earth, and not annual; and therefore are not chargeable, but by cuſtom. Gibs. 683. Mines.

This having been aſſerted, as a known law, in the caſe of Buxton *verſus* Hutchinſon; it is added, that the court therefore directed a trial to be had at law, whether there was any, and what cuſtom within that townſhip, for the payment of tithe-oar. 2 Vern p. 46. Gibs. 683.

Concerning theſe there are two queſtions: 1. whether they ſhall pay tithe? And tho' it was urged, that they are of the nature of the land, and ſo are privileged, yet the whole court was of opinion, that inaſmuch as the owner dug them up, and made profit of them, and ſold them in another pariſh, tithe ſhould be paid of Nurſeries.

them. 2. by whom the tithe ſhall be paid? Which queſtion was reſolved in the caſe of Grant and Hedding, in theſe words, If the owner ſells them, and pulls them up himſelf, he ſhall pay the tithes; but if he ſell them particularly to another, the vendee ſhall pay the tithes. Gibs. 683, 684. 3 Cro. 526. *Jones* (W.) 416. Hard. 380.

Oak. This, together with aſh and elm, is agreed on all hands to be privileged from paying tithe, by the ſtatute of *Sylva Cædua*, as timber, being of or above the growth of twenty years: but, beſides this, it hath been reſolved, that oak under twenty years, being fit for timber in time to come, ſhall not pay tithe; and that, tho' it ſtands till it is rotten, and unfit, not only for timber, but for all manner of uſes, except the fire, it ſhall be privileged, becauſe it had been once privileged.

Orchards. Of theſe, my lord Coke ſaith, if the ſoil of an orchard be ſown with any kind of grain, the parſon ſhall have tithe of the fruit trees, and of the grain, for they be of ſeveral and diſtinct kinds. See *garden*, *Fruit*.

Oſiers. Theſe being employed in hurdles for ſheep, no tithe ſhall be paid of them. 2 Keb. 635.

Park. The general queſtion upon this head hath been, where a park hath paid a modus, and is diſparked, whether the modus ſhall continue, or be diſcharged, and tithe paid in kind? And all the books are clear, that if the modus was a certain conſideration in money for all the tithes of ſuch a park, ſuch modus ſhall hold, notwithſtanding it be diſparked. But if the modus was, for the deer and herbage of ſuch a park, the modus is gone, upon diſparking. Gibs. 684. Mo. 909. 3 Cro. 467. 2 Bulſt. 240.

In like manner, if the modus had been to pay a buck and a doe for all tithes of ſuch a park, and the park is diſparked, the modus ſhall continue, and the owner may give a buck and a doe

doe out of another park; but if it was, to pay the ſhoulder of every deer, or expreſsly a buck or a doe out of the ſame park, the modus is gone. Gibs. 684. Noy 34. Mo. 909.

But where the modus was, part in money, and part in veniſon out of the park (viz. two ſhillings and the ſhoulder of every deer,) the court was divided, two being of opinion that the two ſhillings continued, and that the ſpiritual court ſhould aſſign an equitable recompence for the ſhoulders, according to the number that had been uſually paid; and the other two, that the money and veniſon making one entire modus, the one being gone, the whole was diſſolved: which ſeems, by Moor, to have been according to a judgment given before, in the reign of queen Elizabeth. Gibs. 684. Hob. 39. Godb. 237.

No tithe ſhall be paid of the eggs or young of partridges and pheaſants; becauſe they are *feræ Naturâ:* and tho' they be made tame, or be kept in a place incloſed (their wings being clipped,) and there lay eggs, and hatch young ones; yet the caſe is not altered. Gibs. 684. 1 Rol. Abr. 636. Partridge.

See *Agiſtment.* Paſture.

It was reſolved. 12 Jac. 1. that if one gather green peaſe to be eat in his houſe, no tithe ſhall be paid of them; but otherwiſe, if he gather them for ſale, or to feed his hogs. Gibs. 684. 1 Rol. Abr. 647. See *beans.* Peaſe.

Ann. 15 Car. 1 prohibition was granted, upon ſurmiſe, that the cuſtom was, that tithe ſhould not be paid of pheaſants. Gibs. 684. Mar. 26. See *Partridge.* Pheaſants.

Ann. 15 Jac. 1. it was reſolved, that tithe ought to be paid of pidgeons, and prohibition was denied. Which ſeems to be meant of pidgeons ſold, becauſe it was adjudged the year before, that of ſuch only, and not of thoſe that are ſpent Pigeons.

in the houſe, tithe ſhould be paid, for this is the diſtinction that hath ſince obtained; though they are ſo far from being *feræ*, that it is felony to take them out of a pidgeon-houſe; and as to the reaſon given in Rolle, that they are for the maintenance of thoſe who labour in other things, whereof the parſon hath tithes, *that* will equally cut off the tithe of calves, lambs, pigs, &c. if the owner ſhall pretend that they are to be ſpent in his houſe. Gibs. 684. 1 Rol. Abr. 644. 2 Roll. rep. 2.

The ſame is declared concerning pidgeons, which are in holes about a houſe, and increaſe there. Gibs. 684.

Pigs. Tithe of theſe is to be paid (in the ſame manner as tithe of *calves*, which ſee;) as ſoon as they are weaned, and can live without the dam. Gibs. 684.

Quarries. No tithe is payable out of quarries or pits of any kind, becauſe they are parcel of the inheritance; and, beſides, (they ſay) the parſon may have tithe of the ſurface; which, by the way, affords a very poor tithe, if any: in 5 H. 4. a petition of the Commons was denied, about being ſued in the Eccleſiaſtical Courts, for tithes of ſtone and ſlate taken out of the quarries. The ſame petition was renewed 8 H. 4. and the king's anſwer was, that the former cuſtom ſhould continue. The like had been attempted about ſea coals, 51 Ed. 3. In thoſe days, it ſeems, ſuch things were tithable, at leaſt by cuſtom; and it was not thought proper to be altered. Gibs. 684. 1 Rol. Abr. 637. Mo. 908. 1 Cro. 277. Mar. 58. Still. Eccl. 263.

Rakings. Of theſe, no tithe is due *de jure*; being left for the poor, (as was directed in the law of Moſes) and being alſo the remains of corn, for which tithe hath been paid; but this is to be underſtood only of rakings, which have been *minus voluntarie diſperſæ*; and therefore if they are ſued in the ſpiritual court, the ſuggeſtion for a prohibition muſt expreſly ſet that forth; and it is not ſufficient to

ſay,

ſay, that they were *lapſæ & diſſipatæ in collectione.* Gibs. 684. Littl. 35. 1 Cro. 475. 1 Rol. Abr. 645.

But that, heretofore, tithes were thought to be due of rakings *de jure*, (and that, by conſequence, no temptation was left to evil-minded-men to defraud, by enlarging the rakings,) is evident from hence, that when ſuits were brought by incumbents for them, the plea of the defendant often was, a modus of ſomething done for the parſon that he was not obliged to do; which plea had been unneceſſary, if rakings in their own nature had not been tithable. Gibs. 684. 1 Cro. 702. Noy, 15. Mo. 278. Sav. 100.

It was reſolved, in the caſe of Dr. Skinner, 15 Car. 1. that if a man cut coppice wood, and pay tithe of it, and before any new branches ſprung out, grub up the roots and ſtubbs of the wood; he ſhould not pay tithe of them, becauſe they are *parcel of the franktenement*, and not *annually renovant.* Gibs. 684. Roots.

This is a predial ſmall tithe: for where the parſon had the great tithes, and the vicar the ſmall, and a land which had been ſown with corn, was ſown with ſaffron, the tithe was adjudged to the vicar, as a ſmall tithe; notwithſtanding the ſtat. 2 Ed. 6. c. 13. that tithes ſhall be paid in ſuch manner as they have been for forty years paſt. Gibs. 685. Mo. 909. Ow. 74. Saffron.

This is ſaid not to be tithable, but by cuſtom only. Gibs. 685. Salt.

Whereas ſheep produce two things tithable, viz. lamb and wool; theſe two are ſpoken of under the reſpective heads. Sheep.

But as to the tithe for depaſturing of ſheep, the rule of that by the canon law, is laid down in the provincial conſtitutions; and, in the books of common law, there are theſe two caſes: 1. Where the owner of the ſheep had depaſtured them in the pariſh, from Michaelmas to Lady-day, and then ſold them; upon ſuit in the ſpiritual court for a

tenth of the bargain, the owner, to obtain prohibition, ſurmiſed that he could pay a tenth of the wool, according to the cuſtom of the pariſh: but prohibition was denied, becauſe the parſon was defrauded of all, if he had not the tenth of the bargain; inaſmuch as the ſheep were gone out of the pariſh; and he could not have any wool, becauſe it was not the time of ſheering. 2. Where ſheep were taken in to depaſture, after the corn was reaped; and the defendant, to have a prohibition, ſuggeſted, that he took them in to feed, *pro melioratione agriculturæ, infra terras arabiles, & non aliter*; the court held, that the parſon ought not to have tithe of the corn and ſheep too; for the ſheep make the ground more profitable, and to yield more; which is a fair diſtinction, if the owner took them in *gratis*; but if he had any conſideration for them, an Inn-keeper might as well ſay, that he takes in gueſt-horſes, *pro melioratione agri*, and upon that, plead a diſcharge from tithe. Gibs. 685. Poph. 197. 1 Mod. rep. 216.

Dr. Godolphin ſays, if ſheep ſtray out of one pariſh into another, and there yean, no tithe is payable for this to the parſon of that place; but if they go there for thirty days or more, for this a rate tithe is payable to that place; for, for ſheep removed from one pariſh to another, each parſon muſt have tithe *pro rata:* but under thirty days no rate tithe is to be paid. God. 438.

And by conſtitution of Archbiſhop *Winchelſea*, if ſheep do couch in one pariſh, and feed in another, the tithe ſhall be divided between the two churches: yet (ſaith Lyndwood) not equally, but proportionably; for the far greater part ought to be aſſigned to that church, within the pariſh whereof they fed for the time, than to that where they only couched. Lyndw. 198.

And further, by the ſaid conſtitution it is ordained, that if foreign ſheep ſhall be ſhorn in any pariſh,

pariſh, the tithe ſhall be there delivered to the rector of the church, unleſs he can be ſufficiently informed, that ſatisfaction hath been made for the tithe elſewhere, ſo as lawfully to hinder the payment thereof in ſuch pariſh where they are ſhorn. Lynd. 197. God. 438.

In like manner, if a perſon ſhall buy or ſell any ſheep, and it is certain from what pariſh the ſheep do come, the tithe thereof ſhall be proportionably divided between the two pariſhes: but if it be uncertain, that church ſhall have the whole tithe, within the limits whereof they are found at the time of ſhearing. Lynd. 194.—See *Lambs*.

This is reckoned among the things not tithable, *de jure*, as being of the ſubſtance of the earth; of the ſurface of which tithe is payable. Slate.

Tithe being paid for the corn, no tithe ſhall be paid for the ſtubble; becauſe this is no more than part of the ſtalk, upon which the corn grew. Gibs. 685. Yelv. 87. Stubble.

See *Trees*, *Wood*. Sylva Cædua.

If tares are cut down green, and given to cattle for the plough, no tithe ſhall be paid for them. This is the rule laid down; but it is to be obſerved, that where this hath been ſo adjudged, it was upon theſe two conſiderations; either, 1ſt. that they had not, in the pariſh, ſufficient paſture for the draught cattle and milch kine; as in the caſe of Perry and Soam: or, ſecondly, becauſe it was the cuſtom of the pariſh, that green tares, cut for labouring cattle, ſhould not pay; as, in the caſe of *Mead* and *Shirman*. Gibs. 685. 1 Cro. 139. 2 Leon. 27. Jones, (W.) 357. Tares.

A preſcription may be within a pariſh that, by reaſon they have not ſufficient meadow for milch kine and draught cattle, they have uſed to cut ſome of their tares green, and give them to the aforeſaid ſtock, and to be diſcharged of tithes for the ſame: and this is a good cuſtom and conſideration,

for that the parſon hath an advantage thereby, as well as the pariſhioner; namely, in the tithe milk, and manuring of the other corn land; and the matter is, the want of meadow and paſture; and the ſurmiſe is, as if it had been ſaid, that for want of meadow and paſture, they have uſed to eat their meadows with their plough-cattle, and for ſo much as they did eat to pay no tithes. Wats. c. 49. Bunb. 279.

So if a man, according to the cuſtom of the country, doth ſow his land to feed his horſes for tillage, and the uſe hath been to ſuffer the horſes to be fed upon the land, without any mowing of the grain, the parſon ſhall not have any tithes thereof; becauſe it is no more than paſture for his horſes. Watſ. c. 49.

Tile. This is one of the things which my lord Coke mentions as not tithable; being of the ſubſtance of the earth, and not annual. 2 Inſt. 651.

Trees. By a conſtitution of Archbiſhop *Winchelſea*, tithes ſhall be paid of trees, if they be ſold: which Lyndwood explains of large trees, which bear no fruit, and being cut down are not fit for timber, but are uſed for fuel. Lynd. 200.

And by a conſtitution of Archbiſhop *Stratford*: foraſmuch as divers perſons do refuſe to pay tithes, which are notoriouſly due, of their *Sylva Cædua*; and of the wood thereof being felled, which things do not require ſo much labour as the fruits of the ground; and think that they lawfully refuſe the ſame, becauſe they have not paid tithes thereof in times paſt; and withal do render it doubtful, what ſhall be deemed *Sylva Cædua*: we do therefore declare that *Sylva Cædua* is that, which of whatſoever kind of trees it is, is kept on purpoſe, and is mature and fit to be cut down, and which being cut down, ſprings again from the ſtump or roots; and that the tithe ought to be paid thereof, as a real and predial tithe; and that the poſſeſſors of ſuch woods

ſhall

ſhall by all manner of eccleſiaſtical cenſures be compelled to pay the tithe thereof, when cut down, as of hay and corn. Lind. 190.

But by the ſtatute of the 45 Ed. 3. c. 3. it is enacted as followeth: "at the complaint of the "great men and the commons, ſhewing, by their "petition, that whereas they ſell their great wood "of the age of twenty years, or of greater age, "to merchants to their own profit, or in aid of "the king in his wars, parſons and vicars of holy "church do implead and draw the ſaid merchants "in the ſpiritual court for the tithes of the ſaid "wood, in the name of this word called *Sylva "Cædua*, whereby they cannot ſell their woods "to the very value, to the great damage of "them and of the realm; it is ordained and "eſtabliſhed, that a prohibition in this caſe ſhall "be granted, and upon the ſame an attachment, "as it hath been uſed before this time."

The wood intended in this ſtatute, is ſuch as is fit for building of houſes and ſhips; and therefore, without doubt it comprehends oak, elm, and aſh; but it hath alſo been adjudged to include beech as timber, in Buckinghamſhire, and ſome other counties, where better timber is not to be had, or is very ſcarce. And thoſe trees are free, not only as to the trunk or timber, but alſo as to the bark, root, and germins that grew upon the ancient ſtock; and it is not material, how often or how ſeldom the branches thereof are lopped, becauſe being once free, they are always free. 2 Inſt. 643.

And it hath been alſo reſolved, that oak under twenty years, being fit for timber in time to come, ſhall not pay tithe; and that tho' it ſtands till it is rotten, and unfit not only for timber, but for all manner of uſes, except the fire, it ſhall be privileged, upon this general maxim, that

that once diſcharged and always diſcharged. 1 Roll. Abr. 640.

But in the caſe of *Buckel* and *Vanacre*, 1692. Upon a bill for tithe wood in Erith in Kent, above twenty years growth, part uſed for timber, and part made into billets and faggots; it was reſolved, that the laſt ſhall pay tithes: for the trees being above twenty years growth alone will not privilege them, but the uſe; and the ſame reſolution was in the caſe of *Acton* and *Smith*, which was reheard and reviewed; and of *Franklin* and *Jones*, in the year 1694; and alſo in the caſe of *Cowper* and *Layfield*. Bunb. 99.

And in the caſe of *Greenaway* and the Earl of Kent, H. 1704, timber trees above twenty years growth, cut and corded for fuel, and the bark ſtripped from the ſame, were adjudged to pay tithes, as well as underwood; but that no tithe was due for ſuch wood above twenty years growth, nor of the bark thereof, which was not corded. Bunb. 89.

But finally, in the caſe of *Walton* and lady *Mary Tryon*, December 15, 1751. The plaintiff brought his bill, as rector of Mitcham in Surry, for the tops and lops of old pollard oaks, aſhes, and elms; and the tops, lops, and bodies of beeches.—Mr. Wilbraham argued for the plaintiff: the tithe of wood is certainly payable; and the law, as to this, is now pretty certain. The 45 Ed. 3. is an explanatory law; and all lops and tops are tithable if the tree be under twenty years growth. Before the ſtatute of *Sylva Cædua*, all were tithable; but by that law it is declared, that all timber trees ſhould be exempt: and the reaſon is plain; for timber trees yield but one profit, and that but once in a century; and therefore, as it was ſo long before the owner had a profit, that wood was exempt. But even by this act it was not meant that the whole tree was exempt; the body

body only, not the tops and lops were ſo. Since this act, the courts have gone ſo far, as to exempt all parts of the tree: and even germins from theſe trees have alſo been determined to be exempt. After this, the courts endeavoured to bring it to ſome rule; and the buyers were always to pay the tithes. Afterward, the courts held, that trees not coverted to the uſe of timber were tithable; and on this ſome caſes have been determined. As the caſe of *Man* and *Sommerton*, 1 Brownl. 94. So the caſe of *Hawes* and *Cornwal*, 1 Lev. 189. where it is ſaid, that wood for fire-wood, tho' of twenty five years growth, ſhall pay tithe when felled. So in the caſe of *Rapley* and *Lloyd*, all wood for burning was held tithable. In the caſe of *Briggs* and *Martin*, T. 6 W. a bill was brought by the plaintiff, as leſſee of the rectory of Bromley in Kent, for tithe wood made into bavings: the defendants by their anſwer, inſiſted, that old pollards and dotards paid no tithe; but notwithſtanding this, the court decreed an account and ſatisfaction to the plaintiff for them. The courts ſeem to have gone a ſtep further. They have had regard to the uſe made of the wood, and not to the age of the pollard; namely, what was uſed for timber, and what for fire-wood; the former was held to be exempt, the latter to pay tithes. And agreeable to this was the caſe of *Greenaway* and the earl of *Kent*, before the lord chief baron Ward. The bill was brought by the plaintiff as vicar of Walford in Herefordſhire. The defendant inſiſted, that no tithes were due of ſuch wood as was above twenty years growth. A croſs bill was brought. And on hearing, the court declared, that the plaintiff was intitled to the tithe of all wood above twenty years growth as well as under, which was corded, but not otherwiſe. But it may be objected, ſhall tithes be ſo uncertain, as to be determined by the

the uſe of them? I anſwer, that in many caſes, tithes muſt depend upon the uſe of them. As in wood, if it is made into bavings for fireing it is tithable; if to make fences, it is not ſo. So if one fats cattle on land, agiſtment is due for them; ſo if he keeps cattle as barren, tithes are paid: but cattle kept for the plough are exempt, and even thoſe reared for the plough are exempt. Theſe are all eſtabliſhed caſes, and do not want any confirmation. The caſe of *Brook* and *Rogers*, Moor 908. is very expreſs, that if timber is lopped before twenty years growth, tithes ſhall be paid of the loppings. And if theſe trees in queſtion have been conſtantly cut, and tithes have been paid of them without any contradiction (as is now in proof,) why is not this an evidence that theſe trees were cut before twenty years growth, and out of the ſtatute of *Sylva Cædua*? And this preſumption may more naturally ariſe in this caſe, for the falls here happen but once in ſixteen or twenty years; and one of the plaintiff's witneſſes ſpeaks to tithes being paid of theſe trees forty five years ago without any moleſtation whatſoever; and not one witneſs is produced for the defendant, who will venture to ſwear, that ever one load of timber was cut without paying tithes: and if that be the caſe, the natural preſumption is that this wood is tithable; for it has paid tithes, as long as memory can go back. As to the *beech*; if it be timber, as inſiſted upon by the defendant, then it comes within the ſtatute of *Sylva Cæduo*. And this matter muſt be tried, if the parties think it worth their while to diſpute it.—By Mr. Solicitor general, for the defendant: the queſtion now put is, whether the tops and lops cut from trees above twenty years growth are liable to pay tithe, if cut in order to be uſed as fuel. And this is a queſtion of a very extraordinary nature indeed, and contrary to both old and modern law; for no point

was

was ever laid down more clearly, from the time of Edward the third to the preſent time, than this, that tops and lops of trees above twenty years growth, are always exempt: and the reaſon is, when once a tree is privileged, it always remains ſo. The caſe in *Moor* 908, cited for the plaintiff, is expreſsly for the defendant; for that particularly ſtates, that if not cut within the twenty years, then it is exempt. And ſo have been abundance of other caſes. And how can the right of the parſon ariſe from the *uſe* of the thing? How is it poſſible for the parſon to know the owner's intent? The right therefore ought to commence from the time it is ſo cut and ſevered. The earl of *Kent's* caſe does not prove the preſent diſtinction; for that proves, that the trees themſelves were in queſtion; and nothing at all was ſaid of the lops and tops. Beſides, they were not pollards or dotards, but young oaks. This proves, that all trees cut down and uſed for fire, would be liable to tithes. But this proves too much. But there is a note on the back of Mr. *Brown's* brief in that cauſe (which I have), that ſettles what this caſe was: he ſays there was poſitive evidence, that the trees corded had grown from ſtems of old wood, and was formerly coppice wood; and this will alter the caſe greatly. The caſe of *Layfield* and *Cowper*, T. 1698, was on a bill for tithes of lops and tops of timber trees; the defendant inſiſted, that they were the product of beech and aſh trees; he admitted, he did convert them to fuel and cordwood; but, in regard that they were above twenty years growth, inſiſted, that they were exempt: by the decree, an account was directed for wood in general; and exceptions were taken to the remembrancer's report, that he had taken no notice that theſe beeches were ſome thirty, ſome fifty years growth, and were timber, and therefore exempt; and of that opinion was the court.

court. In the caſe of *Bibey* and *Huxſley*, H. 1724, the bill was for tithe of coppice and other wood: the defendant inſiſted, that he had felled ſeveral timber trees of twenty years and upwards, and dug up ſeveral roots, and made them into ſtocks, and made the tops into faggots; ſome were uſed for repairs, others for fuel; and as theſe were all above the age of twenty years, the body with all the reſt are exempt from paying tithes by law: and it was decreed, that the plaintiff ſhould have an account of the tithe-wood; except for the tithe of oak, aſh, and maiden trees of beech proceeding from ſtools above twenty years growth: the application therefore to *fuel* does not make the difference. But it is objected, that it muſt be preſumed theſe trees now in queſtion were cut before twenty years growth; and therefore never had the privilege: but as that is not charged by the bill, it cannot be preſumed. As to the beech, if inſiſted on, it muſt be tried.—By the lord chancellor Hardwicke; the tithes demanded by the bill are of two ſorts; Firſt, tops and lops of old pollard oaks, aſhes, and elm; Secondly, beech-trees, both body and branches. The principal queſtion ariſes on the tops and lops of old pollard oaks, and the reſt. There is no difference in point of fact. It is admitted on both ſides, that there is no coppice wood in this ground; that they are ancient pollards: and as to the beeches, that they are of twenty years growth and upwards, and the greateſt part of them was cut and made into billets, and ſold for fire, except a ſmall part of them which was uſed for poſts and rails. The plaintiff has proved, that at two former falls, tithes were ſet out and taken of this wood, the one in 1712, the other in 1728; on the other hand, the defendant has not proved any fall when tithe was not paid; but has proved, that in theſe two falls the family lived in Northamptonſhire,

thamptonſhire, and knew nothing of their being ſet out and taken, and that no other wood in the pariſh does pay tithe, or ever had paid. The plaintiff has founded his right on this; namely, the *uſe* and application of the things of which tithe is demanded: but tho' this be the general right ſet forth in the bill; yet if any other right appears, the plaintiff will be intitled to an account. This is a queſtion of very great conſequence, both to the owners of wood, and to the clergy alſo; and has been argued both from *reaſon* and *authorities*. And upon the *reaſon* of the thing, it has been ſaid, that there is no more reaſon why tithes ſhould not be paid of wood, than of any other product of the earth, for it *annuatim renovat*: but this proves too much; for according to this reaſoning, all wood in general would be liable; and tho' this does *annuatim creſcere*, yet it does not *annuatim renovare*; at common law, coppice-wood is ſubject to tithes, tho' it does not *annuatim renovare*; yet in its nature it ought to pay; for it is cut under a certain courſe of years, and is looked upon as an ordinary ſtated renewal, like the caſe of Saffron; but of timber trees, the ſtated rule is otherwiſe; there the law does not wait for a ſtated courſe of felling. It was further reaſoned for the plaintiff, that the lops and tops of pollards are tenancy profits: but this is no rule of tithes, and varies in different counties; and would make the affair of tithes very uncertain; and in many places, the lops of ſpiral trees are allowed to tenants for fire-wood, and yet ſuch lops are not tithable. It was further ſaid to be reaſonable, that the *uſe* and application ſhould determine whether the thing was tithable or not; that as a coppice is liable, ſo it is reaſonable that any other wood, not timber, but uſed for fuel, ſhould be ſo too. But this goes to the queſtion put in the iſſue by the bill, and I am afraid

afraid would be a very dangerous innovation; the ſubſequent uſe of the thing, as it does alter the nature, cannot give a tithable quality which it had not before; if it could, why not *vice verſa*, that is to ſay, if wood not timber ſhould be applied to the uſe of timber, why ſhould not ſuch uſe exempt it from the payment of tithes? this was never heard of, yet it is equally reaſonable. It is ſaid, there are certain caſes where the uſe and application of the thing ſhall make it tithable; and there will appear no greater uncertainty in one caſe than in the other; as for inſtance, wood cut to be burned in the houſe of a pariſhioner, this was ſaid to be not liable; but that is not true, unleſs by cuſtom; for it was otherwiſe determined in the caſe of *Norton* and *Fermer*, Cro. Cha. 113. It was ſaid alſo, that cattle for the plough and pail are not tithable; ſo there the uſe determines: but this is not a predial, but a mixt tithe, which the pariſhioner is not obliged to ſet out at a particular place or time; and the parſon receives it in another manner, by taking the tenth part of the profits. In many caſes it is impoſſible to ſay, to what uſes the wood may be applied: the owner may ſell it ſtanding, the buyer to cut it; and if ſo, how is the intention to be known? and in many counties where timber is very plentiful, there it is often cut down and uſed as fuel; and if the uſe and application was to prevail, it would make two different common laws of tithe, and this without any cuſtom: the law for tithes of wood is a poſitive law, to wit, that of all timber trees of twenty years growth or upwards, whether timber by law or cuſtom, no tithe is to be paid, either of bodies, lops, or tops. It has been much controverted, whether the ſtatute of *Sylva Cædua* is a new law, or only declaratory of the common law: the latter is now the ſettled opinion; for the words of the ſtatute are, *it has been uſed of old.* In the ſtatute, the wood is particularly

cularly mentioned, and its age and growth; but not one word is ſaid of the uſe: and the opinion of all the courts upon the conſtruction of this ſtatute has been, that where the tree is timber, by law or cuſtom, of twenty years growth or upwards, it is exempt: and in 2 Inſt. 642, 643. the rules are very particularly laid down. Theſe rules have not been contradicted, except in the caſe of germins that came from old ſtools, and which is the caſe of moſt coppices in England. But it is aſked, what difference is there, if germins grow from trees entirely cut down, or from trees that have been lopped? I anſwer, that the difference is great; for in the caſe of germins that come from ſtools, no tree remains from whence the privilege is derived; but in the caſe of lops and tops the tree remains, and ſo does the privilege. I come now to conſider the *caſes* cited againſt this doctrine by the counſel for the plaintiff. The caſe of *Man* and *Somerton*, 1 Brownl. 94. is not applicable to the preſent caſe. The caſe of *Hawes* and *Cornwall*, 1 Lev. 189, is this: "wood cut for firing, though "above twenty years growth, ſhall pay tithes; and "ſo pollards, if above fifty years." But this was very ſhort and imperfectly ſtated, and is not ſupported by law at all; and by a report of the ſame caſe in 1 Sid. it is ſaid, that the wood was coppice wood; and by the determination, moſt probably it was ſo; and therefore proves nothing for the plaintiff. But it is ſaid, there is no difference between pollards and underwood, for pollards are not timber: but I anſwer, that pollards having gained this privilege, always retain it; and the bodies of pollards may ſerve to many uſes, as timber doth; and if dotard trees are privileged, much more ought pollards. The next caſe cited was that of *Brigs* and *Martin*, which was on a bill for lops and tops of old pollard and dotard trees; and an account was accordingly directed: but on what this

was founded does not appear, nor whether these pollards were under the time of privilege or not; and what makes this case the more extraordinary is, the decree in the case of *Northley* and *Colbe*, in the very next term, and it, is directly contrary; and the only way of reconciling these two cases, is, that in the first case it must have appeared that the pollards were cut before twenty years growth. *Greenaway* and the earl of *Kent*, was the next case, and most principally relied on; and the ground of this decree was, that all wood, even above twenty years, that was cut and corded, should be tithable; and goes further than any case before or since: but the lord chief baron Ward, in that case, was of a quite different opinion, and made a learned argument against the decree; but the other three barons differed from him; therefore, I observe, this was not a uniform authority; and I think the chief baron Ward's was the best opinion: baron Price's reasons in that cause, do not satisfy me at all; when he was considering the statute of *Sylva Cædua*, he said, that ancient statutes must be construed according to the intent, and not literally; and that *great wood* does not in its strict sense mean trees of this sort, but such wood as is applicable to large buildings; which is in effect to say, that a tree, which in its nature is timber, yet if it is not large, and is applied to firing, shall be tithable: another ground that he went upon, was the statutes relating to the rules of felling of wood; but these are rules laid down only for the preservation of timber, and cannot be applicable to tithes that were demanded of them: and upon the whole, this determination is directly contrary to all the other authorities; for there is a *tempus constitutum*, and that cannot be departed from; and I will say further, that there has been no precedent since to follow it; for as to that case of *Bibey* and *Huxley*, that is rather against it. If these trees now in question,

queſtion, were lopped and made pollards before twenty years growth, and ſo have continued to be lopped, then they will be liable to tithes: but this is a queſtion of fact proper to be tried, being too much for me to determine, upon the evidence now laid before the court: I am rather inclined to think that they were not, for the plaintiff himſelf, in his bill, has ſtated them to be ancient pollards, and large. The ſecond queſtion relates to the tithe of *beeches*, both bodies and branches: and it is not diſputed, but that this wood is above twenty years growth; and then the matter of fact muſt be tried whether it is timber by the cuſtom of the county: and if ſo, it will be exempt; otherwiſe it muſt pay tithes. 2 B. E. L. 411, 416.

Turf. This was declared to be tithe-free, as part of the freehold, 22, 23 Car. 2. as it had been declared before my lord Coke. Gibs. 685. 1 Mod. Rep. 35. 2 Inſt. 651.

Turkeys. If the reſolution upon this head was really as Moor reports it, viz. that tithes are not payable of turkeys, nor their eggs, *quia feræ naturâ*; it is not eaſily conceived, upon what conſideration they ranked them under that head: or, ſuppoſe *feræ naturâ* there, relates only to partridges or pheaſants, which come between; it is no leſs difficult to conceive, why turkeys (if they are not *feræ naturâ*) ſhould be diſcharged of tithes, more than tame fowl of other kinds. Gibs. 685. Mo. 599.

In the caſe of *Carlton, verſus Brightwell*, before the maſter of the Rolls, it was delivered by him as follows: I cannot ſee, but that turkeys, are birds as tame as hens or other poultry, and, therefore, muſt pay tithes. It is true, if tithes be once paid of the eggs, there can be no demand made a ſecond time, in reſpect of the chicken hatch'd afterwards. 2 P. Will. 462.

Warren. See *Conies*.

Waſte. By the ſtatute 2 Ed. 6. c. 13. ſect. 3. the tithe of cattle feeding on large waſtes, where the pariſh is uncertain, ſhall pay tithe to the incumbent of that pariſh, in which the owner of the cattle dwells; unleſs limited otherwiſe by cuſtom or preſcription. Gibs. 685. Sav. 60.

Willows. Where the ſurmiſe was, that in the county of Southampton, willows were uſed as timber, it was judged, that they were not tithable, and a prohibition was granted. But elſewhere, if willows are growing about a houſe, though it is waſte to fell them, yet being felled, tithe ſhall be paid of them. Gibs. 685. Hob. 219.

Anno 28, 29 Eliz. preſcription by one to pay but 6*s.* 9*d.* for the tithe of all willows cut down by him in ſuch a pariſh, was declared an ill preſcription; becauſe, if he cut down all the willows of other men too, but 6*s.* 9*d.* ſhall be paid for all. But to have preſcribed for all willows cut down upon his own land, would have been good. Gibs. 685. Godb. 61.

Woad. This growing in the nature of an herb, the tithe thereof is a ſmall tithe, as was agreed by all the juſtices, in the caſe of Udal and Tindal. 1 Car. 1. 3 Cro. 28. Hel. 77.

Wood. The caſes relating to wood, may be reduced to four heads:

1. How far and in what reſpect, wood is tithable? in the caſe of the earl of Clanrickard, 17 Jac. 1, it was ſaid by Henden, that, originally, tithe was not paid to the clergy of wood, before the time that archbiſhop *Stratford* made a conſtitution, (17 Ed. 3.) that tithe ſhould be paid within his juriſdiction, of *Sylva Cædua*. But although that conſtitution, by the tenor of it, ſeems to extend to wood in general, it is to be obſerved, that the petition of the commons againſt the clergy, in the very next parliament (18 Ed. 3.) was not, for taking tithe of wood, but of every manner of wood,

wood, *i. e.* of great trees, as well as of the reſt. And there are a great number of petitions in the rolls of parliament, during that reign, praying relief in the ſame caſe; which ſeems to imply, that that was the only grievance they labour'd under, as being againſt the common law and cuſtom of the realm; for if the demand of tithe of other wood had alſo been againſt cuſtom, why did not all the petitions run againſt tithe of wood in general? At the ſame time, it muſt be acknowledged, that the commons ſay, in one of their petitions, 2 Rich. 2. that before the firſt peſtilence, no tithe of any manner of wood was given, granted, or demanded; and we find there was a great peſtilence. 22 Ed. 3. Gibs. 685, 686. Palm. 39.

It was reſolved, in the caſe of Norton and Farmer, that *de jure*, *per legem terræ*, no perſon can be diſcharged of tithe of wood, even though it be fewel and hedging; and that therefore it hath been uſual, in prohibitions, to alledge hearth-penny, or the like, for the diſcharge: from whence it follows, that where ſuch conſideration or recompence to the parſon is not alledged, tithe is due, *de jure*; with which ſuppoſition, the admitting of a bare cuſtom, *de non decimando*, in caſe of wood, ſeems hardly reconcileable. Gibs. 686. 3 Cro. 113.

It was ſaid, in the forementioned caſe of the earl of Clanrickard, that though tithe of wood is not of annual payment, yet it is of annual growth; and that therefore, (as it ſeemed) there could not be a preſcription of trees, *de non decimando*. Gibs. 686. Palm 38.

In the caſe of *Hicks* and *Woodſon*, H. 8 & 9 W. it is ſaid, that wood is not *de jure* tithable, becauſe it doth not renew annually; and that therefore in libels in the ſpiritual court for wood, they alledged a cuſtom, although it was ſaid, that the practice of the ſpiritual court at this day is otherwiſe: but the court did not regard that; for Holt, chief juſtice,

ſaid, that they made ſtones, gravel, and all things tithable. L. Raym. 137. 2 Salk. 656.

But in the caſe of *Jordan* againſt *Colley* and others, E. 1720: on a bill by the rector for tithe wood in the pariſh of Little Wenlocke, in the county of Salop, as it had been time out of mind paid in that pariſh, againſt the defendants, as venders of ſir William Forreſter; the defendants in their anſwer ſay, that no tithe had been paid for this coppice wood, called Holebrook coppice, when felled before, and that they never heard that any tithe or modus had been paid for wood in that pariſh. It was inſiſted upon for the defendants, that tithe wood was not due of common right, and therefore, that the proof lay upon the plaintiff, and that it was only founded upon a canon in biſhop Startford's time; and therefore, that the defendants need not alledge any preſcription or cuſtom by way of exemption: but it was anſwered for the plaintiff, that occupiers muſt always ſet forth an exemption. And by the court, the defendants ought to have ſhewn ſome exemption; and there is no inſtance, that a pariſh can preſcribe in *non decimando* for tithe wood; wilds and hundreds are upon another conſideration.—But note, ſays the reporter, although the court decreed againſt the defendants, yet it doth not ſeem to have been yet certainly determined, that tithe wood is due of common right. Bunb. 61.

But in the caſe of *Boulton* and *Hurſler*, T. 2. G. 2. the plaintiff having libelled in the ſpiritual court for the tithe of *Sylva Cædua*, the defendant moved the court of King's-bench for a prohibition: and the ſuggeſtion was, that they were timber trees, and of twenty years growth. It was urged further, that the court might grant a prohibition, even upon the face of the libel; becauſe the demand is ſet forth generally, and therefore muſt be intended that this tithe is due of common right; whereas

whereas the right of the tithe wood is only by cuſtom. And that was the reaſon given in the caſe of *Hicks* and *Woodſon*, why a hundred may preſcribe in a *non decimando* of the tithe wood; for as by cuſtom, it grows due, by cuſtom it may be made not due. But the court ſaid, that this reaſon indeed was laid down by the judges of this court, in that caſe; but they ſaid, this has never been allowed for law by any of the other judges of Weſtminſter-hall, and it certainly is not law: for tithe is as much due of *Sylva Cædua*, by the law of England, as any other tithe whatſoever. And judge Reynolds ſaid, this may evidently be ſhewn not to be the reaſon of this law, in relation to hundreds; for if it was, the ſame reaſon would prove that every private man may preſcribe in a *non decimando* of this nature. And for this reaſon, and alſo becauſe the defendant in the ſpiritual court had not alledged in his plea there, that the trees were of twenty years growth, a prohibition was denied. 1 Barnard. 71.

2. What ſort of tithe, wood doth yield? that it is predial, is plain: but, whether great or ſmall, hath been a queſtion between the parſons and the vicars. And, in the caſe of Reynolds and Green, ſomething is delivered that tends to that point. "By the opinion of the whole court clearly, the "parſon *de mero jure*, ought to have the tithe-"wood, if the vicar be not endowed of the ſame, "or claims to have it by preſcription: but with "ſuch a donation or preſcription, the ſame belongs "to the parſon." And in the ſequel of that caſe, it is expreſly declared to be a great tithe, and implied that it could not paſs under the terms *alteragia & minutæ decimæ*, but in virtue of the conſtant uſage of paying it to the vicar. But 4 Car. 1. in the caſe of Wood and Greenwood, it was held, that wood is *minuta decima*; and the two caſes of Tindal and St. Albans, are referred to for proof

of it: which ſeems alſo to be ſuppoſed in the caſe of Tildell and Walter, 21 & 22 Car. 2. where a vicar libelled in the ſpiritual court for tithe wood; and the ſuggeſtion to obtain a prohibition, was, that time out of mind they had paid no ſmall tithe to the vicar. Gibs. 686. 2 Bulſt. 27. Littl. 243. 1 Mod. Rep. 50.

Amidſt this variety of judgments, we can only ſay theſe two things: 1. that, in common opinion, wood paſſes for a great tithe; 2. that, in controverſies between parſon and vicar, where the endowment is loſt, this point is determined by preſcription; and in caſe the endowment remains, and doth not expreſly mention wood, and yet that tithe hath been uſually taken by the vicar, the law will, by favourable conſtruction, either graft it upon ſome general expreſſion in the endowment, (as in the forementioned caſe of Reynolds and Green,) or elſe preſume that there might be a ſubſequent augmentation of the endowment of the vicar, by which he became entitled to tithe-wood. Gibs. 686.

That wood is a predial tithe is plain; but whether great or ſmall, hath been a queſtion between the parſons and vicars; and it hath been reſolved, that if a vicar be only endowed with the ſmall tithes, and have, by reaſon thereof, always had tithe wood; in ſuch caſe it ſhall be accounted a ſmall tithe, otherwiſe it is to be accounted amongſt the great tithes. Deg. p. 2. c. 1.—But this doth not alter the quality of the tithe: and the vicar's having received it, may be evidence of a grant thereof having been made ſubſequent to the endowment, although ſuch original grant is now loſt; but is not evidence that wood in itſelf is a ſmall tithe.

3. How many ways may wood be diſcharged of tithe? and thoſe are reducible to three heads; with regard to the age it is of, the uſe it is put to, and the

the place of its growth. 1. With regard to the age; timber-trees, of or above twenty years growth, are diſcharged by the ſtatute of *Sylva Cædua*; (which ſee under *Trees*). 2. With regard to the uſe it is put to; wood for the owner's firing, hedging and fencing of the premiſſes within the ſame pariſh, hath been adjudged tithe-free, but this is to be alledged, not abſolutely, that *per legem terræ*, wood ſo applied ſhall not pay tithe, but *ſub modo*, that the parſon hath ſome conſideration for it, or at leaſt that the houſe is for maintenance of huſbandry, by reaſon of which the parſon hath *uberiores decimas*. By which rule, if a man hath an houſe of huſbandry with lands, and demiſing the lands, reſerveth the houſe, tithe of firewood is payable. In the caſe of Scoles, *verſus* Lowther, it is declared, that where a man has wood in one pariſh, and arable land in another, if he makes uſe of this wood in making fences for his arable land, yet he ſhall pay tithes to the parſon where the wood grows; but it had been otherwiſe, if it had been the ſame pariſh. 3. With regard to the place of its growth; as the Wild of Kent, (ſaid to contain twenty pariſhes) and the Wild of Suſſex; within which, a preſcription to be diſcharged of tithe of wood, (though diſallowed 12 Jac. 1. in the caſe of Ruſſel and Backhurſt,) hath been often held to be good, upon this ſuppoſition, that tithe of wood in general is due by cuſtom only, (which, by the way, hath been often ſaid, but never proved) and that therefore it is not within the rule againſt preſcriptions in *non decimando* by lay-men; which rule they extend only to tithes that are due *de jure*, as corn, hay, and the like. Gibs. 686. 3 Cro. 113. Mo. 683. Littl. 52. Keb. 319. Sand. 136. 1 Vent. 75. Siderf. 447. Skin. 561. L^d. Raym. 130. 2 Bulſt. 285. Palm. 37. Hetl. 110.

. What is the manner of tithing wood? It was ſaid by Hobart, in the caſe of Hide and Ellis, that in divers places they fell out the tenth acre of wood ſtand-

ſtanding; and ſo, it may be by the pole or perch, or by the tenth faggot or billet, according as the cuſtom of the place hath been. Heb. 250.

Wool. There is no diſpute concerning the kind of tithe which wool yields; for it is agreed by all to be mixt, and was declared, in the caſe of Ward, to be a ſmall tithe. Nor is there any doubt, but that it is *de jure* tithable: ſo that, it hath been adjudged, that, however for the bodies of ſheep killed, and ſpent in the houſe, no tithe ſhall be paid, yet the wool ſhall pay tithe; and for theſe, as well as for rotten ſheep which die, a conſultation is provided in the regiſter, in theſe words, *De decimâ lanæ provenientis de ovibus eorundem, parochianorum infra eandem parochiam occiſis, & morientibus, a feſto S. Michaelis, uſque ad feſtum paſchæ, ſingulis annis.* And ſo, in a ſuit for neck wool, where the defendant in the ſpiritual court prayed prohibition, upon this ſuggeſtion, that they uſed between Michaelmas and Allhallontide, to cut the head, neck and ears, to preſerve their ſheep from vermin and flies, and by this to make the fleece the better, and that they were to pay the tenth fleece at ſheering time, but not to pay any of theſe neck-fleeces, being, as they alledged, of no value: in this caſe prohibition was denied, becauſe the parſon had the ſame right to the tenth fleece of the neck, as to the tenth fleece of the back; and becauſe the allowing this cuſtom might be the foundation of great fraud, and an opportunity of ſpoiling the fleece under colour of neck-ſhearings. But when the forementioned ſuggeſtion ſucceeded not, another was found, viz. that they uſed to wind up the other fleeces for the parſon at their own charge; and this obtained a prohibition, notwithſtanding all the former reaſonings of the court. But, according to Rolle, conſideration was alſo had of that other circumſtance of clearing them from vermin, inaſmuch as it appeared, that the ſhearing at that time

of

of the year could not be for the fleece of the wool. Nor ſhall tithe be paid of locks of wool, if it appear that they were caſually loſt, but otherwiſe, if by contrivance and fraud. Gibs. 686, 687. Poph. 144. 1 Rol. Abr. 646, 647. 3 Bulſt. 242. Mo. 911.

And with regard to the forementioned right of tithe-wool, *de jure*; it was held in the caſe of Nicols and Hooper, 16 Jac. 1. that tho' a man pay tithe of lambs at mark-tide, and afterwards at Midſummer, ſhear the reſidue, or the nine parts; tho' there are not above two months between the times of ſuch tithing and ſhearing, yet he ſhall pay tithe-wool of the reſidue, becauſe there is a new increaſe. Gibs. 687. 1 Rol. Abr. 642.

And alſo if there be under ten pound of wool, a reaſonable conſideration ſhall be paid: becauſe being due *de jure*, a modus in *non decimando* cannot be allowed in any caſe. 1 Rol. Abr. 687.

But, as to the ſtrict right of tithe-wool: it hath been limited, by an allowance of the two following modus's, as good: viz, 1. the tenth part of the wool of all the ſheep which he had before Lady-day, in ſatisfaction of all the wool of ſuch ſheep, as ſhould be brought into the pariſh *after* Lady-day. 2. to be diſcharged of tithe of thoſe he ſhould ſell but two days before the ſhearing, in conſideration that time out of mind, he hath paid tithe-wool of thoſe which he bought but two days before the ſhearing. Gibs. 687.

In the caſe of *Wilſon* and the biſhop of *Carliſle*, T. 13 Ta. Wilſon brought a prohibition againſt the biſhop, who held the living of Grayſtock in *Commendam*; and ſaid, that there was within the pariſh of Grayſtock this cuſtom for tithing of wool, that if any inhabitant have five fleeces of wool or above, he ſhall, after the ſhearing and binding up of the ſame, without fraud or deceit, pay to the rector (after notice given) the tenth part thereof, at the door of the manſion-houſe

of

of ſuch perſon inhabiting within the ſaid pariſh, without ſight or touch of the nine parts by the rector or his agent; and that the parſons have ſo accepted it. To this the biſhop demurred in law. And it was adjudged for the biſhop, with one conſent; for the ſubſtance of the preſcription is laid, that the very true tenth is and ought to be paid without fraud; which is not preſcriptible, for it is common right. Then the ſole point preſcriptible is, that this is without view or touch of the nine parts; which is, in effect, repugnant to the other: for when you have laid the truth in the former part, you lay the way to fraud in the latter. For it is againſt common reaſon, that any man judge or divide for himſelf, and then take choice of his own diviſion, againſt the rule of partition laid down by Littleton; for the truth of the tenth depends upon the proportion it holds with the nine parts; and therefore, for the pariſhioner to ſet out a part for the tenth, which he only affirms to be juſt, is to give him merely power to tithe as he liſts; and the preſcription were as reaſonable as to ſay plainly, that they might ſet out what tithe they pleaſed. And it is a weak anſwer to ſay, that if it be not a juſt tenth, he may refuſe it, and ſue for his due. For he hath no means to be aſſured whether it be true or not; ſo his ſuit may be cauſeleſs: ſure he may be, it will be fruitleſs. But the law was provided, not to cauſe, but to prevent ſuits; and therefore provides, that things be done by indifferent means and perſons, that there be no juſt ſuſpicion of indirect dealing. Hob. 107.

So in the caſe of *Chriſtain* againſt *Wreu* and others, M. 1732; on a bill by the vicar of Croſthwaite in the county of Cumberland for tithes, the defendants inſiſted on a cuſtomary manner of payment of tithe-wool of the elder ſheep, by weighing the wool, and delivering the tenth part, without fraud, to the vicar, without his

his ſeeing or touching it: but this was over-ruled, on the authority of the aforeſaid caſe in Hobart. Bunb. 301.

In the ſame caſe, the pariſhioners inſiſted, that they ought to pay no tithe of hog wool, (that is, of the wool of ſheep of a year old); alledging, that no tithe thereof had ever been paid; that the tenth lamb having been paid (or compoſition for the ſame), the other nine ſhould not pay tithe of their wool that ſame year; and inſiſting further, that a modus being paid for the tithe lambs, the ſaid modus included alſo the tithe of the hog-wool. But the evidence not coming up to the proof of its being included within the modus, and the other allegations being plainly ſetting up of a *non decimando*; was decreed, that the tithes of the hog wool ſhould be paid as well as of all the other wool. For it is clearly a new encreaſe.

The title to tithe of wool being ſettled; there is another queſtion, viz. how the tithe ſhall be proportioned between the ſeveral incumbents, in caſe ſheep are removed from one pariſh to another, between the times of ſhearing; upon which head, the rule of the Engliſh canon-law is ſet forth in the conſtitution of Archbiſhop Winchelſea, viz. that tithe of wool ſhall be paid to the incumbent from the time of ſhearing till Martinmas, tho' they be afterwards removed: that, if they be removed, within the ſaid time, from pariſh to pariſh, each incumbent, in whoſe pariſh they ſhall remain at leaſt thirty days, ſhall have his proportion of the wool; but, if they be removed from pariſh to pariſh after the ſaid time (that is, from Martinmas to the time of ſhearing,) a reaſonable agiſtment ſhall be paid by the owners for the time they ſtay. But the common law will not allow agiſtment to be paid of ſheep that are fatted, and ſold, becauſe they will render tithe of their wool, as was adjudged in the caſe of

Facey

Facey and Lange, 7 Car. 1. and it was ſaid by Jones, (abſolutely, and with equal regard to all times of the year,) that if a pariſhioner ſells ſheep, the parſon ſhall have allowance of tithe-wool after ſhearing, (as of eighty pound of wool, the tithe of which is eight pound, there ſhall be for the half years paſture, four pound; for a quarter of a year, two pound, &c.) tho' the contrary was held, 2 Car. 1. that in ſuch caſe the incumbent out of whoſe pariſh they are ſold, ſhall have agiſtment, as is obſerved before under the title ſheep. So that, however plain and clear the rule of the eccleſiaſtical law is, the rules of the temporal law in this matter ſeem not to be eaſily reconciled; nor, with ſubmiſſion, does it ſeem fair, that a plain eccleſiaſtical law, in a merely eccleſiaſtical matter, ſhould be laid aſide, or over-ruled, without very good reaſon given for it. Gibs. 687. 1 Rol. Abr. 647. Latch. 254. Poph. 197.

A cuſtom to pay tithe in kind for ſheep, if they continued in the pariſh all the year, and an half-penny for every one that was ſold before the time of ſhearing, was adjudged an unreaſonable cuſtom, as evidently defeating the parſon of his juſt right. Gibs. 687. Mar. c. 128.

As to the time of paying tithe-wool; *de jure* it is due, when clipped; but by preſcription it may be ſet out altogether at another time; and when the ſpiritual court diſallowed this plea, they were prohibited. 1 Cro. 702. Mo. 910.

CHAP. V.

Of ſetting out, and taking and carrying away tithes.

All perſons obliged to ſet out tithes.

EVERY perſon is bound, of common right, to cut down, and ſet out the tithes of his land. So that when a parſon made a collector of tithes, and that collector licenſed a pariſhioner to carry away

away his corn without ſetting forth of tithes, it was declared a void licence. And in order to the due ſetting out, that it may be done faithfully, and without fraud; the laws of the church entitled the parſon to have notice given him; but by the declarations of common law, ſuch notice is not neceſſary. The furtheſt they have gone, is, to declare a cuſtom of tithing without view, an abſurd cuſtom; and the ſtatute law (2 Ed. 6. cap. 13. ſect. 2.) entitles a parſon, though not to notice, to a right of ſeeing it ſet out. And if a queſtion be, in the ſpiritual court, whether tithe were ſet out, or not, no prohibition lies. Gibs. Cod. 688. Noy 134. 1 Rol. Abr. 643. 2 Vent. 48.

Time and manner of ſetting out.

The time, and manner of ſetting out tithes, (*i. e.* whether it is to be done, when the things are in ſheafs, or cocks, or ſhocks,) depends upon the particular cuſtom of every place; which is to be followed. The books of common law declare, that, of common right, the owner is obliged to do no more, in order to the tithing of corn, than to bind it up in ſheafs; and it being a maxim, that every modus muſt be ſomething for the advantage of the parſon, which the owner is not bound to do, the ſetting into cocks or ſhocks hath been offered as the foundation of a modus, when no other pretence could be found; and particularly adjudged a good conſideration, for not tithing the odd ſheaves, under the number of ten. But they cite no ancient teſtimonies, to make the tithing in ſheaves the common law of tithing; and Lyndwood (who uſually diſtinguiſhes between what is due *de jure communi*, and what *de conſuetudine*,) ſets all the method of tithing upon the ſame foot of *cuſtom*. *Aliqui* (ſays he) *decimant ſecundum* Garbas, *eas projiciendo ſparſim in ſulcos*; *alii decimant ſecundum* Acervos, *garbis invicem collectis*; *alii decimant non in* Campis, *ſed in* Horreo *proprio*; *alii ducunt illam decimam ad horreum ſacerdotis*. And however ſtrange this

this laſt clauſe may look, Lyndwood lays it down as the law of the church, *colonus de jure tenetur, non ſolum decimas colligere & coacervare, ſed etiam in horreum ſacerdotis afferre.* Gibs. 688, 689. ſee 2 Leon. 70. Latch. 125. Palm. 440. 2 Keb. 36. Siderf. 283.

The tenth land of corn, (inſtead of the tenth ſheaf or ſhock) beginning with that land which is nigheſt to the church, hath been adjudged a good cuſtom; notwithſtanding it was alledged, that the occupiers, knowing which would fall to the ſhare of the parſon, did not till, manure or ſow it, as they did the reſt; for this fraud (they ſaid) might be remedied by an action at common law; might not the cuſtom as well be declared, a cuſtom againſt reaſon, when the preſumption is ſo ſtrong, that in ſuch caſe the occupier will not beſtow equal care upon it, as upon his own; and when it is ſo difficult to ſtate the degrees of care, taken or required; and ſince, if due care be not taken, no remedy is left, but what (conſidering the difficulty of proof, and other circumſtances) is worſe than the diſeaſe? Gibs. 689. Mo. 913.

It is ſaid to have been agreed by all the juſtices in the Common-pleas, (29 Eliz.) that by the civil law the parſon ought to have his tithe by the tenth ridge: but not ſo, I ſuppoſe, as to let the occupier know which parts he was to neglect, by making it neceſſary to begin of courſe with the ridge which was nigheſt to the church. The maxims of civil and canon law are not uſually overvalued in our temporal courts; but the uſe which was made of this, was, that the reaping, binding, and ſhocking, being (in conſequence of that doctrine) more than the owner was bound to do, theſe ſhould become a good modus to diſcharge him of tithe for the hay growing in the head lands. Gibs. 689. 2 Leon. 70.

Tithes ſet out are lay-chattels.

Tithes being ſet out, or ſevered from the nine parts, become lay-chattels. This is the doctrine of

of all the law books: and, upon this foundation, when the tithe of corn was ſet out in ſheaves, and the parſon would not take it, but prayed remedy in the ſpiritual court, a prohibition was granted; and when a ſequeſtration was prayed in the temporal courts, of tithes not ſet out, the right of which was in controverſy, the party was told, his requeſt had been reaſonable, if they had been ſevered from the nine parts. For the ſame reaſon, if after ſeverance they are carried away by a ſtranger, the remedy is in the temporal courts: and though it is otherwiſe, if carried away by the owner, the reaſon is, becauſe his ſetting them out in order to carry them away, is a fraudulent ſetting out. Gibs. 689. 2 Leon. 201. Sav. c. 71. 1 Cro. 607. Noy 44. Mo. 502. 2 Rol. 440.

Parſon to take care of the tithes ſet out.

The care of the tithes, as to ſpoiling, &c. after ſeverance, reſts upon the parſon, and not upon the owner of the land. So it was declared in the caſe of Dr. Bridgman, that though the pariſhioner ought *de jure* to reap the corn, he is not bound to guard the tithes of the parſon; on the contrary, if the parſon does not carry them away in convenient time, an action on the caſe lies againſt him. But ſo, that the pariſhioner may neither bring ſuch action, nor put in his cattle, till he hath given notice to the parſon, that they are ſet out. And if tithes be ſpoiled, and the parſon ſeeketh remedy in the ſpiritual court, and prohibition is obtained upon falſe ſuggeſtions, a conſultation is provided in the regiſter. Gibs. 689. Noy 31.

In the caſe of *Gale* and *Ewar*, one point was, that the occupier, after ſeverance, took the nine parts, and turned his cattle into the meadows where the tithes were, which deſtroyed and conſumed the tithes. Holt, chief juſtice, ſaid, that though there was no obligation to give *notice* of the ſeverance, (as is adjudged in the caſe,) yet he thought the turning of cattle to the tithe, made it

a *fraudulent* ſeverance, and that a ſuit might be maintained for it in the ſpiritual court. Comyn. 22.

Parſon may ſpread and dry the tithes.

After the tithes are ſet forth, the parſon may of common right come himſelf, or his ſervants, and ſpread abroad, dry and ſtack his corn, hay, or the like, in any convenient place or places upon the ground where the ſame grew, till it be ſufficiently weathered, and fit to be carried into the barn. But he muſt not take a longer time for the doing thereof, than what is convenient and neceſſary; and what ſhall be deemed a convenient and neceſſary time, the law doth not, nor can define; for the quantity of the corn or hay, and the weather, in this caſe, are to be conſidered; and what ſhall in this, and all other caſes of like nature, be ſaid to be a reaſonable and convenient time, is to be determined by the jury, if the point come in iſſue triable by a jury; but if it come to be determined upon a demurrer, or other matter of law, the judges of the court where the cauſe depends are to reſolve the ſame. Deg. p. 2. c. 14. Str. 245.

By the ſaid ſtat. 2 & 3 Ed. 6. c. 13. ſect. 2. if any perſon carry away his corn or hay, or his other predial tithes, before the tithe thereof be ſet forth; or willingly withdraw his tithes of the ſame, or of ſuch other things whereof predial tithes ought to be paid; and if any perſon do ſtop or let the parſon, vicar, proprietor, owner, or other their deputies or farmers, to view, take, and carry away their tithes as is aboveſaid, he ſhall forfeit double value, with coſts, to be recovered in the eccleſiaſtical court.

Parſon to carry away his tithes in convenient time.

The parſon hath a right to carry away his tithes; and if that be obſtructed, he ſhall have remedy in the ſpiritual court. Accordingly, 8 Jac. 1. conſultation was granted in that very caſe, becauſe (it being to no purpoſe to ſet out tithes, if he who ſet them out, hinder them to be carried away,) this was adjudged a fraudulent ſetting out; which, though

though poſſibly a good reaſon, ſeems not to be a true one, but to be uſed on purpoſe, to ſave the maxim, of tithes being a lay-chattel after ſetting out; ſince (without the help of that diſtinction,) the ſtatute 2 Ed. 6. c. 13. ſ. 2. doth in expreſs words give remedy before the ſpiritual judge, in caſe the parſon is ſtopped in carrying away his tithes; upon which it was reſolved, (43 Eliz. in Blackwell's caſe,) that the queſtion being in the ſpiritual court, whether the gate was locked, or open, no prohibition ſhould be granted. Gibs. 689. 1 Cro. 844.

And the parſon may carry his tithes from the ground where they grew, either by the common way, or any ſuch way as the owner of the land uſeth to carry away his nine parts. But if there are more ways than one, and the queſtion is, which is the right way, this is cognizable in the temporal court. Deg. p. 2. c. 14.

And if the owner of the ſoil, after he hath duly ſet forth his tithes, will ſtop up the ways, and not ſuffer the parſon to carry away his tithes, or to ſpread, dry, and ſtack them upon the land, this is no good ſetting forth of his tithes without fraud, within the ſtatute: but the parſon may have an action upon the ſaid ſtatute, and may recover the treble value; or may have an action upon the caſe for ſuch diſturbance, as it ſeemeth; or he may, if he will, break open the gate or fence which hinders him, and carry away his tithes. Deg. p. 2. c. 14.

But in this he muſt be cautious that he commit no riot, nor break any gate, rails, lock or hedges, more than neceſſarily he muſt for his paſſage. Deg. p. 2. c. 14.

And when he comes with his carts, teams, or other carriages, to carry away his tithes, he muſt not ſuffer his horſes or oxen to eat and depaſture the graſs growing in the grounds where the tithes ariſe, much leſs the corn there growing or cut:

but if his cattle (as cannot be avoided) do in their paſſage, againſt the will of their drivers, here and there ſnatch ſome of the graſs, this is excuſable. Deg. p. 2. c. 14.

It ſeems, that if tithes ſet forth, remain too long upon the land, the owner of the ſoil may take them *damage feaſant*; but then, if he be ſued for them, in order to juſtify, he muſt ſet forth how long they had remained before he took them; and when they ſhall be ſaid to remain too long, is triable by the jury. Wats. c. 54. Or an action upon the caſe will lie againſt the parſon for his negligence in this behalf: but no action in ſuch caſe will lie, unleſs the pariſhioner hath duly ſet forth his tithes, and hath alſo given notice to the parſon that they are ſo ſet forth. Deg. p. 2. c. 14. L. Raym. 187.

After ſeverance of tithe from the nine parts, the parſon is obliged, in convenient time, to carry them away: otherwiſe, the occupier may ſuffer in a double reſpect; firſt, becauſe the graſs does not grow where the corn lies; and next, the occupier cannot depaſture his cattle there, for fear of doing damage to the corn: nor can he put in his cattle, and eat the corn; it being unreaſonable that himſelf be judge what is a convenient time. But it is much more reaſonable to permit the occupier to bring his action againſt the parſon, and ſo the court to be judge of the reaſonableneſs of the time, and the recompence be proportionable to the loſs ſuſtained. Ld. Raym. 189.

CHAP. VI.

Of the remedies for recovering tithes, and the ſeveral Acts of Parliament made for that purpoſe.

Tithes anciently recoverable in the County-court.

IN the Saxon times, tithes were recoverable in the County-court, where the biſhop or his deputy, and the ſheriff, did ſit as co-ordinate judges, there

there being at that time no ſeparate court of ordinary eccleſiaſtical juriſdiction. 2 Inſt. 661.

By a conſtitution of archbiſhop *Winchelſea*: "for- Recoverable in the Spiri-
"aſmuch as many are found, who are not willing tual-court,
"freely to pay their tithes, we do ordain that the by the canon
"pariſhioners be admoniſhed once, twice, and law, and by
"thrice, to pay their tithes to God and the church: divers ſta-
"and if they do not amend, they ſhall firſt be tutes.
"ſuſpended from the entrance of the church, and
"ſo at laſt be compelled to pay their tithes by cen-
"ſures eccleſiaſtical, if it ſhall be neceſſary: and
"if they ſhall deſire a relaxation or abſolution of
"the ſaid ſuſpenſion, they ſhall be remitted to the
"ordinary of the place, to be abſolved and pu-
"niſhed in due manner." Lind. 191.

By the ſtatute of *circumſpecte agatis*, 13 Ed. 1. ſt. 4. "The king to his judges, ſendeth greeting:
"Uſe yourſelves circumſpectly in all matters con-
"cerning the clergy, not puniſhing them if they
"hold plea in court-chriſtian, in the caſe where a
"parſon doth demand of his pariſhioners, obla-
"tions or tithes, due and accuſtomed: in which
"caſe the ſpiritual judge ſhall have power to take
"knowledge, notwithſtanding the king's prohibi-
"tion."

Accuſtomed.] By this act, *modus decimandi*, and real compoſition, are eſtabliſhed: for hereby are tithes divided into two parts; in *decimas debitas*, and that is *quota pars*, the tenth part; and into *decimas conſuetas*, which are due by cuſtom and uſage, in ſatisfaction for tithes; for which ſatisfaction, or *modus decimandi*, the parſon may ſue in court-chriſtian, and is warranted by this act: for the rule is, that the modus is to be ſued for in the eccleſiaſtical court, as well as the very tithe; and if it be allowed between the parties, they ſhall proceed there; but if the cuſtom be denied, it muſt be tried at the common law; and if it be found for the cuſtom, then a conſultation muſt go; otherwiſe, the prohibition ſtandeth. The like is affirmed, in caſe a

jury, upon an iſſue joined in a prohibition upon a *modus decimandi*, find a different modus; ſince a modus is found, they ſhall not have conſultation. Gibs. Cod. 691, cites Hob. 247. Noy 81. Hatl. 133. 1 Vent. 32.

The principal reaſons why the courts of common law prohibit the ſpiritual courts from trying of modus's, are, that whereas every modus is leſs than the real value, the rule of the common law is, that leſs than the real value ſhall not be taken, and that a cuſtom to the contrary is void; and, that the eccleſiaſtical and temporal laws differ in the times of limitation; forty years making a good cuſtom with the firſt; whereas, by the ſecond, it muſt be beyond the time of memory. Gibs. Cod. 691.

To which it hath been replied, that though the general rule of the common law, is not to admit leſs than the real value, yet there are ſeveral exceptions; as, in caſes of perſonal, and ſmall tithe; in which, cuſtomary payments are allowed, without breach of conſcience; the ſpiritual courts have commonly allowed pleas of *modus decimandi*, and are ready to allow them; that the averment in the prohibition, is not, that they do take cognizance, but that the pleas hath been offered, and refuſed; which ſuppoſes, that if the plea be admitted, the prohibition ought not to go; that, accordingly, it hath been affirmed by Doderidge and others, that they may as well try the modus, as the right of tithes; and that prohibition is not to be granted, till the ſpiritual court either refuſe to admit the plea, or proceed to try it by methods different from the rule of the temporal law, as to the time of limitation, or number of witneſſes, or the like. And whereas my lord Coke contended for the contrary doctrine; it was declared by Keling and Twiſden, 20 Car. 2. in the caſe of the biſhop of Lincoln againſt Smith, that in caſe one libel for a

modus

modus decimandi, if the ſpiritual court allow the plea, they may try it; and Coke's opinion againſt trying penſions claimed by preſcription, in the ſpiritual court, they ſaid, was not warranted by the book. Gibs. Cod. 691. Still. Eccles. Caſ. p. 311.

Ann. 1 W. & M. in the caſe of Bradſhaw and Swanſton, prohibition was denied, on ſuggeſtion of compoſition, in a ſuit for tithes. Show. 81.

In caſe of tithes, obventions, oblations, and mortuaries, no prohibition ſhall lie; but it ſhall be otherwiſe in caſe of money for tithes; for then they are chattles.

By the ſtatue of *articuli cleri*, 9 Ed. 2 St. 1 c. 1. "Whereas laymen do purchaſe prohibitions "generally upon tithes, obventions, oblations, mor- "tuaries; the king doth anſwer to this article, that in "tithes, oblations, obventions, mortuaries, (when "they are propounded under theſe names,) the "king's prohibition ſhall hold no place, altho' "for the long withholding of the ſame the money "may be eſteemed a ſum certain. But if a clerk, "or a religious man, do ſell his tithes, being "gathered in his barn, or otherwiſe, to any "man for money; if the money be demanded "before a ſpiritual judge, the king's prohibition "ſhall lie; for by the ſale, the ſpiritual goods "are made temporal, and the tithes turned into "chattles."

By the Stat. 18 Ed. 3. ſt. 3. c. 7. Whereas writs of *ſcire facias* have been granted to warn prelates, religious, and other clerks, to anſwer *diſmes* in our chancery, and to ſhew if they have any thing, or can any thing ſay, wherefore ſuch *diſmes* ought not to be reſtored to the ſaid demandants, and to anſwer as well to us as to the party, to ſuch *diſmes*; ſuch writs from henceforth ſhall not be granted, and the proceſs hanging upon ſuch writs ſhall be annulled and repealed, and the parties diſmiſſed from the ſecular judges of ſuch manner of pleas.

Writs of ſcire facias.] This is a writ where one hath recovered debts or damages in the king's courts, and ſueth not for execution within a year

and a day; after which he ſhall have this writ, to warn the party; who coming not or ſaying nothing to ſtay execution, a writ of *fieri facias* goes, commanding the ſheriff to levy the debts or damages of his goods. *Terms of the law.*

To warn Prelates, religious, and other clerks.] This *ſcire facias* was not brought againſt the poſſeſſors of the land for ſubtraction of tithes, but againſt the prelates or other clerks, which took the tithes after they were ſevered. Commiſſions out of the chancery were directed to certain perſons giving them authority to enquire whether ſuch a ſpiritual perſon ought to have tithes of ſuch lands; whereupon inquiſitions were taken and returned: and if it where found for the ſpiritual perſon, upon this record, he might have a *ſcire facias* againſt any prelate, religious, or other clerk, that took them after ſeverance. 2 Inſt. 640.

Eccleſiaſtical judges, in cauſes of tithes, being compelled by the ſecular power to obligations to deſiſt; all ſuch obligations ſhall be void, and the procurers puniſhed.

By the Stat. 1 R. 2. c. 13. "The prelates and "clergy of this realm do greatly complain them, "for that the people of holy church, purſuing "in the ſpiritual court for their tithes and their "other things, which of right ought, and of "old times were wont to pertain to the ſame "ſpiritual court; and that the judges of holy "church, having cognizance in ſuch cauſes, and "other perſons thereof, meddling according to "the law, be maliciouſly and unduly for this "cauſe indicted, impriſoned, and by ſecular "power horribly oppreſſed, and alſo inforced "with violence, by oaths and grievous obligations, "and many other means unduly compelled to "deſiſt and ceaſe utterly of the things aforeſaid, "againſt the liberties and franchiſes of holy "church: wherefore it is aſſented, that all ſuch "obligations made or to be made by dureſs or "violence, ſhall be of no value. And as to "thoſe that by malice do procure ſuch indictments, "and to be the ſame indictors, after the ſame

"indictees

" indictees be ſo acquitted; ſuch procurers ſhall " ſuffer a year's impriſonment, and reſtore to the " parties their damages, and ſhall nevertheleſs " make a grievious fine unto the king. And the " juſtices of aſſize, or other juſtices, before whom " ſuch indictees ſhall be acquit, ſhall have power " to inquire of ſuch procurers and indictees, " and duly to puniſh them according to their " deſert."

By the Stat. 1 R. 2. c. 14. "At what time that " any perſon of the holy church be drawn in " plea in the ſecular court for his own tithes taken " by the name of goods taken away; and he " which is ſo drawn in plea maketh an exception, " or alledgeth, that the ſubſtance and ſuit of " the buſineſs is only upon tithes due of right, " and of poſſeſſion to his church or other his " benefice: in ſuch caſe the general averment ſhall " not be taken, without ſhewing ſpecially how the " ſame was his lay chattle."

By the 27 H. 8. c. 20. When by the noiſe of the diſſolution of monaſteries in this parliament, laymen took occaſion, upon trifling pretences to withdraw their tithes, it was enacted as followeth:

Divers perſons withholding their tithes, in contempt of the eccleſiaſtical court, enacted, that every perſon ſhall pay tithes according to law and cuſtom.

" Foraſmuch as divers evil diſpoſed perſons, " inhabited in ſundry counties, cities, towns and " places of this realm, having no reſpect to their " duties to almighty God, but againſt right and " good conſcience, having attempted to ſubtract " and withhold in ſome places the whole, and in " ſome places great part of their tithes and " oblations, as well perſonal as *predial*, due unto " God and holy church; and purſuing ſuch their " deteſtable enormities and injuries, have at- " tempted in late time paſt to diſobey and contemn " the proceſs, laws and decrees of the eccleſiaſtical " courts of this realm, in more temerarious and " large manner than before this time hath been " ſeen: for reformation of which ſaid injuries,

" and

" and for unity and peace to be preſerved amongſt
" the king's ſubjects of this realm, our ſovereign
" lord the king, being ſupreme head on earth
" (under God) of the church of England, willing
" the ſpiritual rights and duties of that church
" to be preſerved, continued and maintained,
" hath ordained and enacted by authority of this
" preſent parliament, that every of his ſubjects
" of this realm, according to the eccleſiaſtical
" laws and ordinances of his church of England,
" and after the laudable uſes and cuſtoms of the
" pariſh or other place where he dwelleth or oc-
" cupieth, ſhall yield and pay his tithes and
Miniſters ſhall compel them by eccleſiaſtical laws; " offerings, and other duties of holy church;
" and that for ſuch ſubtractions of any the ſaid
" tithes and offerings or other duties, the parſon,
" vicar, curate or other party in that behalf
" grieved, may by due proceſs of the kings
" eccleſiaſtical laws of the church of England,
" convent the perſon offending, before his ordinary,
" or other competent judge of this realm, having
" authority to hear and determine the right of
" tithes, as alſo to compel the ſame perſon of-
" fending to do and yield his duty in that behalf:
And if any eccleſiaſtical judge be diſobeyed, the ſecular power ſhall aſſiſt him; " and in caſe the ordinary of the dioceſe or his
" commiſſary, or the archdeacon or his official,
" or any other competent judge aforeſaid, for
" any contempt, contumacy, diſobedience or other
" miſdemeanor of the party defendant, ſhall make
" information and requeſt to any of the king's
" moſt honourable council, or to the juſtices of
" the peace of the ſhire where ſuch offender
" dwelleth, to aſſiſt and aid the ſame ordinary
" commiſſary, archdeacon, official or judge, to
" order or reform any ſuch perſon in any cauſe
" before rehearſed; that then he of the king's
" ſaid honourable council, or ſuch two juſtices
" of the peace (whereof one to be of the quorum),
" to whom ſuch information or requeſt ſhall be
" made,

" made, ſhall have power to attach or cauſe to be " attached the perſon againſt whom ſuch infor- " mation or requeſt ſhall be made, and to commit " him to ward, there to remain without bail or " mainprize, until he ſhall have found ſufficient " ſurety to be bound by recognizance, or other- " wiſe before the king's ſaid counſellor or juſtice " of the peace, or any other like counſellor or " juſtice of the peace, to the uſe of our ſaid lord " the king, to give due obedience to the proceſs, " proceedings, decrees and ſentences of the ec- " cleſiaſtical court of this realm, wherein ſuch " ſuit or matter for the premiſſes ſhall depend or " be; and that every of the king's ſaid counſellors, " or two juſtices of the peace, whereof the one to " be of the quorum as is aforeſaid, ſhall have " power to take and record ſuch recognizance and " obligations."

and commit the offender to ward, till he find ſurety, to obey the eccleſiaſtical court.

Sect. 2. Provided, that this ſhall not extend to any inhabitant of the city of London, concerning any tithe, offering or other eccleſiaſtical duty grown and due to be paid within the ſaid city; becauſe there is another order made for the payment of tithes and other duties within the ſaid city.

This Act not to extend to London.

Sect. 3. Provided alſo, that all perſons, being parties to any ſuch ſuit, may have their lawful action, demand or proſecution, appeals, prohibitions and all other their lawful defences and remedies in every ſuch ſuit, according to the ſaid eccleſiaſtical laws, and laws and ſtatues of this realm, in as ample manner as they might have had if this act had not been made.

Parties to ſuch ſuit, may have all lawful defences and remedies.

Shall have power to attach.] In the caſe of K. and *Sanchee*, H. 9 W. 3. when ſeveral Quakers had been committed upon this ſtatute, it was alledged, that the juriſdiction of the ſpiritual court was taken away by the act of parliament which gives the parſon a remedy to recover ſuch tithes by diſtreſs,

diſtreſs, by warrant of a juſtice of the peace; but by the court the ſaid act ſeems only to be an accumulative remedy, and not to repeal the former act of the 27 H. 8. L. Raym. 323.

By the Stat. 32 H 8 c. 7. Sect. 1, 2. (which was alſo made upon occaſion of the diſſolution of monaſteries, and which was chiefly intended to enable laymen, that, by the diſſolution, had eſtates or intereſts in parſonages, or vicarages impropriate, or otherwiſe, in tithes, to ſue for ſubtraction of tithes in the eccleſiaſtical courts,) it is enacted as followeth: "Where divers perſons "inhabiting in ſundry countries and places of "this realm, not regarding their duties to almighty "God and to the king our ſovereign lord, but "in few years paſt more contemptuouſly and "commonly preſuming to offend and infringe "the good and wholeſome laws of this realm, "and gracious commandments of our ſovereign "lord, than in times paſt hath been ſeen or "known, have not letted to ſubtract and with-"draw the lawful and accuſtomed tithes of corn, "hay, paſturages and other ſort of tithes and "oblations, commonly due to the owners, pro-"prietaries and poſſeſſors of the parſonages, vicar-"ages, and other eccleſiaſtical places within this "realm; being the more encouraged thereto, "for that divers of the king's ſubjects, being "lay perſons, having parſonages, vicarages and "tithes to them, and their heirs, or to the heirs "of their bodies, or for term of life or years, "cannot by the order and courſe of the eccleſiaſti-"cal laws of this realm, ſue in any eccleſiaſtical "court for the wrongful withholding and detaining "of the ſaid tithes or other duties, nor can by "the order of the common laws of this realm "have any due remedy againſt any perſon, his "heirs or aſſigns, that wrongfully detaineth or "with-holdeth the ſame; by occaſion whereof "much

Contempt of eccleſiaſtical laws among the people;

and particularly in the ſubtraction of tithes; for the recovery of which lay impropriators have not remedy in eccleſiaſtical courts, or at common law.

" much controverſy, ſuit and variance is like to " enſue among the king's ſubjects, to the great " damage and decay of many of them, if con- " venient and ſpeedy remedy be not provided: " It is therefore enacted, that all perſons of this " realm, of what eſtate, degree or condition ſoever " they be, ſhall fully, truly, and effectually divide, " ſet out, yield, or pay all and ſingular tithes " and offerings aforeſaid, according to the lawful " cuſtoms and uſages of pariſhes and places, " where ſuch tithes or duties ſhall ariſe or be- " come due; and if any perſon, of his ungodly " and perverſe will, ſhall detain and with-hold " any of the ſaid tithes or offerings, or any " part thereof, then the perſon or perſons, being " eccleſiaſtical or lay, having cauſe to demand " the ſaid tithes or offerings, being thereby " wronged or grieved, ſhall and may convent " the perſon ſo offending, before the ordinary, " his commiſſary, or other competent miniſter or " lawful judge of the place where ſuch wrong " ſhall be done, according to the eccleſiaſtical " laws; and in every ſuch cauſe or matter of " ſuit, the ſame ordinary or other judge, having " the parties or their lawful procurators before " him, ſhall proceed to the examination, hearing, " and determination of every ſuch cauſe or matter, " ordinarily or ſummarily, according to the courſe " and proceſs of the ſaid eccleſiaſtical laws; and " thereupon give ſentence accordingly."

Every perſon ſhall pay tithe according to the lawful uſage of the pariſh.

" Sect. 3. And if any of the parties ſhall appeal " from the ſentence, order, and definitive judge- " ment of the ſaid ordinary or other competent " judge as aforeſaid; then the ſame judge ſhall, " upon ſuch appellation made, adjudge to the " other party the reaſonable coſts of his ſuit " therein before expended; and ſhall compel the " ſame party appellant, to ſatisfy and pay the " ſame coſts ſo adjudged, by compulſory proceſs

Upon any appeal from the ſentence of the ſpiritual court, coſts ſhall be adjudged againſt the appellant, &c.

" and

" and cenſures of the ſaid laws eccleſiaſtical;
" taking ſurety of the other party to whom ſuch
" coſts ſhall be adjudged and paid, to reſtore
" the ſame coſts to the party appellant, if after-
" wards the principal cauſe of that ſuit of appeal
" ſhall be adjudged againſt the ſame party to
" whom the ſame coſts ſhall be yielded: and ſo,
" every ordinary or other competent judge ec-
" cleſiaſtical ſhall adjudge coſts to the other party,
" upon every appeal to be made in any ſuit or
" cauſe of ſubtraction or detention of any tithes
" or offerings, or in any other ſuit to be made
" concerning the duty of ſuch tithes or of-
" ferings."

Any perſon refuſing to pay tithe, after a definitive ſentence, ſhall be committed to gaol till he obey the ſentence.

" Sect. 4. And if any perſon, after ſuch ſen-
" tence definitive given againſt him, ſhall ob-
" ſtinately and wilfully refuſe to pay his tithes or
" duties, or ſuch ſums of money ſo adjudged,
" wherein he ſhall be condemned for the ſame;
" it ſhall be lawful for two juſtices of the peace
" for the ſame ſhire, whereof one to be of the
" quorum, upon information, certificate, or com-
" plaint to them made in writing by the ſaid
" eccleſiaſtical judge that gave the ſame ſentence,
" to cauſe the ſame party ſo refuſing to be attached
" and committed to the next gaol, and there to
" remain, without bail or mainprize, till he ſhall
" have found ſufficient ſureties, to be bound by
" recognizance or otherwiſe, before the ſame
" juſtices, to the uſe of our lord the king, to
" perform the ſaid definitive ſentence and judge-
" ment."

Proviſo, for lands diſcharged.

Sect. 5. Provided, that no perſon ſhall be ſued or otherwiſe compelled to pay any tithes, for any manors, lands, tenements or other hereditaments, which by the laws or ſtatutes of this realm are diſcharged, or not chargeable with the payment of any ſuch tithes.

Sect.

Sect. 6. "Provided alſo, that this ſhall not in "any wiſe bind the inhabitants of the city of "London, and ſuburbs of the ſame, to pay their "tithes and offerings within the ſame city and ſub-"urbs, otherwiſe than they ought to have done "before."

Lay impropriators ſhall have remedy for recovering eccleſiaſtical eſtates in the temporal courts, by writs original, &c.

Sect. 7. And in all caſes where any perſon ſhall have any eſtate of inheritance, freehold, term, right, or intereſt in any parſonage, vicarage, portion, penſion, tithes, oblations, or other eccleſiaſtical or ſpiritual profits, which ſhall be made temporal, or admitted to be in temporal hands, and lay uſes, and profits by the laws or ſtatutes of this realm, ſhall be diſſeiſed, de-forced, wronged, or otherwiſe kept or put from their lawful inheritance, eſtate, ſeiſin, poſſeſſion, occupation, term, right, or intereſt therein, by any other perſon claiming to have intereſt in, or title to the ſame; the perſon ſo diſſeiſed, de-forced, or wrongfully kept or put out, his heirs, his wife, and ſuch other to whom ſuch injury and wrong ſhall be done, may have their remedy in the king's temporal courts, or other temporal courts, as the caſe ſhall require; for the recovery or obtaining of the ſame, by writs original of *præcipe quod reddat*, aſſize of *novel diſſeiſin*, *mortdanceſtor*, *quod ei deforceat*, writs of dower, or other writs original, as the caſe ſhall require, to be deviſed and granted in the king's court of chancery, in like manner and form as they might have had for lands, tenements, or other hereditaments, in ſuch manner to be demanded: and writs of covenant, and other writs for fines to be levied, and all other aſſurances to be had of the ſame, ſhall be granted in the ſaid chancery, according as hath been uſed for fines to be levied, and aſſurance to be had of lands, tenements, or other hereditaments.

But actions for not ſetting out tithes, or de-

Sect. 8. Provided, that this ſhall not give any remedy, cauſe of action or ſuit, in the courts temporal,

taining of them, ſhall be in the ſpiritual court.

poral, againſt any perſon who ſhall refuſe to ſet out his tithes, or ſhall with-hold or refuſe to pay his tithes or offerings; but that, in all ſuch caſes, the party, being eccleſiaſtical or lay, having cauſe to demand, or have the ſaid tithes or offerings, and thereby wronged or grieved, ſhall have his remedy for the ſame, in the ſpiritual courts, according to the ordinance in the firſt part of this act mentioned, and not otherwiſe.

Recovery of treble value in the temporal courts, by 2 & 3 Ed. 6. c. 13.

By the ſtat. 2 & 3 Ed. 6. c. 13. the aforeſaid acts of the 27 H. 8. c. 20. and the 32 H. 8. c. 7. ſhall ſtand in full force: and moreover, it is further enacted, as followeth, viz. ſect. 1. "All perſons "ſhall truly and juſtly, without fraud or guile, "divide, ſet out, yield, and pay all manner of "the predial tithes, in their proper kind, as they "riſe and happen, in ſuch manner and form as "hath been of right yielded and paid within forty "years next before the making of this act, or of "right or cuſtom ought to have been paid; and "no perſon ſhall take or carry away any ſuch or "like tithes, which have been yielded or paid "within the ſaid forty years, or of right ought to "have been paid, in the place or places tithable "of the ſame, before he hath juſtly divided or ſet "forth the tithe thereof, the tenth part of the ſame, "or otherwiſe agreed for the ſame tithes with the "parſon, vicar, or other owner, proprietary, or "farmer of the ſame tithes; under the pain of "forfeiture of treble value of the tithes ſo taken "or carried away."

Sect. 2. "At all times whenſoever, and as often "as any predial tithes ſhall be due at the tithing "of the ſame; it ſhall be lawful to every party to "whom any of the ſaid tithes ought to be paid, "or his deputy, or ſervant, to view and ſee their "ſaid tithes to be juſtly and truly ſet forth and ſe-"vered from the nine parts; and the ſame quietly "to take and carry away: and if any perſon carry

"away

" away his corn or hay, or his other predial tithes,
" before the tithe thereof be ſet forth; or wil-
" lingly withdraw his tithes of the ſame, or of
" ſuch other things whereof predial tithes ought
" to be paid; or do ſtop or let the parſon, vicar,
" proprietor, owner, or other their deputies or far-
" mers, to view, take, and carry away their tithes
" as is aboveſaid; by reaſon whereof the ſaid tithe
" or tenth is loſt, impaired, or hurt: then, upon
" due proof thereof made before the ſpiritual
" judge, or any other judge to whom heretofore
" he might have made complaint, the party ſo
" carrying away, withdrawing, letting, or ſtopping,
" ſhall pay the double value of the tenth or tithe
" ſo taken, loſt, withdrawn, or carried away, over
" and beſides the coſts, charges, and expences of
" the ſuit, in the ſame: the ſame to be recovered
" before the eccleſiaſtical judge, according to the
" king's eccleſiaſtical laws."

Sect. 4. " Provided, that no perſon ſhall be ſued,
" or otherwiſe compelled to yield, give, or pay
" any manner of tithes, for any manors, lands,
" tenements, or hereditaments, which by the laws
" and ſtatutes of this realm, or by any privilege
" or preſcription, are not chargeable with the
" payment of any ſuch tithes, or that be diſ-
" charged by any compoſition real.

Sect. 13. " And if any perſon do ſubtract or
" withdraw any manner of tithes, obventions,
" profits, commodities, or other duties (before
" mentioned,) or any part of them, contrary to
" the true meaning of this act, or of any other
" act heretofore made; the party ſo ſubtracting or
" withdrawing the ſame, may be convented and
" ſued in the king's eccleſiaſtical court, by the
" party from whom the ſame ſhall be ſubtracted
" or withdrawn; to the intent the king's eccle-
" ſiaſtical judge may hear and determine the ſame,
" according to the king's eccleſiaſtical laws: and

" it ſhall not be lawful to the parſon, vicar, pro-
" prietor, owner, or other their farmers or depu-
" ties, contrary to this act, to convent or ſue ſuch
" with-holder of tithes, obventions, and other
" duties aforeſaid, before any other judge than
" eccleſiaſtical. And if any archbiſhop, biſhop,
" chancellor, or other judge eccleſiaſtical, give
" any ſentence in the aforeſaid cauſes of tithes,
" obventions, profits, emoluments, and other
" duties aforeſaid, or in any of them, (and no ap-
" peal or prohibition hanging,) and the party con-
" demned do not obey the ſaid ſentence; it ſhall
" be lawful to every ſuch judge eccleſiaſtical, to
" excommunicate the ſaid party ſo as aforeſaid
" condemned and diſobeying: in which ſentence
" of excommunication, if the ſaid party excom-
" municate, wilfully ſtand and endure ſtill excom-
" municate, by the ſpace of forty days next after,
" upon denunciation and publication thereof in
" the pariſh church, or the place or pariſh where
" the party ſo excommunicated is dwelling or moſt
" abiding; the ſaid judge eccleſiaſtical may then,
" at his pleaſure, ſignify to the king in his court
" of chancery, of the ſtate and condition of the
" ſaid party ſo excommunicate, and thereupon re-
" quire proceſs *de excommunicato capiendo*, to be
" awarded againſt every ſuch perſon as hath been
" ſo excommunicate."

Sect. 14. " And if the party in ſuch caſe ſhall
" ſue for a prohibition, he ſhall, before any pro-
" hibition granted, deliver to ſome of the juſtices
" or judges of the court where he demandeth pro-
" hibition, a true copy of the libel, ſubſcribed by
" his hand; and under the copy of the ſaid libel
" ſhall be written the ſuggeſtion wherefore he de-
" mandeth the prohibition: and in caſe the ſaid
" ſuggeſtion, by two honeſt and ſufficient witneſſes
" at leaſt, be not proved true in the court where
" the ſaid prohibition ſhall be ſo granted, within

ſix

" ſix months next following, after the ſaid prohi-
" bition ſhall be ſo granted and awarded; then
" the party that is letted or hindred of his ſuit in
" the eccleſiaſtical court, by ſuch prohibition, ſhall
" upon his requeſt and ſuit, without delay, have a
" conſultation granted by the ſame court; and
" ſhall alſo recover double coſts and damages,
" againſt the party that ſo purſued the prohibition,
" to be aſſigned or aſſeſſed by the ſame court; for
" which coſts and damages the party may have an
" action of debt.

Sect. 15. " Provided, that nothing herein ſhall
" extend to give any miniſter or judge eccleſiaſtical,
" any juriſdiction to hold plea of any matter, cauſe,
" or thing, contrary to the ſtatute of Weſtminſter
" 2. c. 5. the ſtatutes of *articuli cleri*, *circumſpecte*
" *agatis*, *Sylva Cædua*, the treatiſe *de regia prohibi-*
" *tione*, nor againſt the ſtatute of 1 Ed. 3. c. 10.
" nor to hold plea in any matter, whereof the
" king's court, of right, ought to have juriſdiction."

Truly and juſtly, without fraud or guile.] See ſect. 1. of the preceding ſtatute. In the caſe of *Heale* and *Sprat*, T. 44 Eliz. in a prohibition, the caſe was, Heale did ſet out his predial tithes, and divided them juſtly from the nine parts, and ſoon after carried away the ſame. Sprat ſued for a ſubtraction of the ſame in the eccleſiaſtical court. *Heale* pleaded that he had ſet them out, as above: whereunto Sprat ſaid, that preſently after his ſetting out, he carried the ſame away, to the defrauding of the ſtatute: and it was adjudged, that this was fraud and guile within this act; albeit he did juſtly divide the ſame within the letter of this law. It was further reſolved, that if the owner of the corn before ſeverance, grant the ſame to another, of intent that the grantee ſhould take away the ſame, to the end to defraud the parſon of his tithe; this is fraud and guile within this ſtatute. 2 Inſt. 649.

Predial tithes,] This branch extends only to predial tithes: thus, in the caſe of *Booth* and *Southraie*, E. 1 Ja. in debt upon this ſtatute, by the parſon of the church, for not ſetting forth of the tithes of cheeſe, calves, lambs, cherries, and pears, to have the treble value; the defendant pleaded *nihil debet*, and it was found againſt him: and it was moved in arreſt of judgment, that the ſaid tithes of cheeſe, or calves, and lambs, were not predial tithes, and therefore not within this branch of the ſtatute; and this act is penal, and ſhall not be taken by equity; which was allowed by the whole court. 2 Inſt. 649.

Within forty years next before the making of this act.] This time of forty years is here ſet down, becauſe forty years in the eccleſiaſtical court about tithes, make a preſcription. 2 Inſt. 649. 1 Ought. 263.

Or of right or cuſtom ought to have been paid.] The ſenſe of theſe words *of right ought to have been paid*, is of tithes to be yielded in ſpecie within forty years; and the ſenſe of the words *of right or cuſtom*, is, by rightful cuſtom, *de modo decimandi*. 2 Inſt. 650.

Under the pain of forfeiture of treble value of the tithes ſo taken, or carried away.] This branch doth not give the forfeiture to any perſon in certain; and therefore it was pretended, that the forfeiture ſhould be given to the king: and thereupon, the attorney general, Hil. 29 Eliz. did exhibit an information in the Exchequer, againſt one *Wood*, a pariſhioner of *Jelington* in the county of *Cambridge*, for this treble forfeiture, for carrying away his tithes before they were juſtly divided. The defendant pleadeth not guilty; and by a jury at the bar he was found guilty; and in arreſt of judgment it was moved, that in this caſe the forfeiture was not given to the king, for that the words of the act be, *under the pain of forfeiture of treble value of*

the

the tithes ſo taken away: and whenſoever a forfeiture is given againſt him, that doth diſpoſſeſs the owner of his property, as here he doth of his tithes, there the forfeiture is given to the party grieved or diſpoſſeſſed; and the rather, for that this is an additional law, and made for the benefit of the proprietor of the tithes; and ſo it was adjudged by Manwood, and the whole court of Exchequer; and this was the firſt leading caſe that was adjudged upon this point; and ever ſince, it hath been received for law, that the party intereſted in the tithes, ſhall in an action of debt recover the treble value. 1 Inſt. 159. 2 Inſt. 650.

And it is to be obſerved, that the treble value only, and not the tithes themſelves, nor any ſatisfaction for them, may be recovered in the temporal court: that being out of the juriſdiction of thoſe courts, and wholly in the ſpiritual court; which is the reaſon why, in all ſuits upon this ſtatute, the action is not laid for ſubtraction of tithes, but for a contempt of the ſtatute, in not ſetting them out; and being a contempt, the action dies with him who committed the contempt; and doth not lie againſt his executor. Gibs. 697. 1 Vern. 60.

And it hath been held, that an action grounded on this ſtatute for not ſetting forth of tithes, is not within the ſtatute of limitations; that ſtatute not extending to actions grounded on acts of parliament; therefore the plaintiff is not by law confined to ſix years, or to any other time certain, within which to bring his action. Wats, c. 58.

Thus, in the caſe of *Marſton* and *Cleypole*, E. 1726, on a bill by a lay impropriator, for tithes in the court of Exchequer, for about twenty-four years; the defendant, as to ſuch part of the bill as prayed diſcovery and relief, for any time before, within ſix years next before filing the bill, or ſerving the *ſubpœna*, pleaded the ſtatute of limitations, and that he did not promiſe to make any

ſatisfaction for any tithes before the ſaid ſix years; but it was over-ruled by the court: becauſe the defendant, as to tithes, is only in the nature of a receiver or bailiff for the plaintiff; in which caſe the ſtatute of limitations doth not operate. Bunb. 213.

If a jury give a verdict for the plaintiff, they muſt find the real value of the tithes, which ſhall be trebled by the court; as, if the jury find the real and ſingle value to be twenty pounds, they ought to give the plaintiff only ſo much, and the court ſhall treble it, and make that ſum given by the jury to be ſixty pounds, which is treble the value: but if the iſſue be upon the cuſtom of tithing, or any other collateral point, the jury then need not to find any value of the tithes; for that in ſuch caſe the defendant ſhall pay the value expreſſed by the plaintiff in his declaration: becauſe, by the collateral matter pleaded in bar, the value of the tithes ſet forth in the declaration is confeſſed. Therefore, in all actions brought upon this ſtatute, if the defendant plead any collateral matter in bar of the action, he muſt take the value of the tithes mentioned in the declaration by proteſtation; that is, he muſt, by the form of a proteſtation, aver, that the tithes were not of that value as is declared, otherwiſe he will be charged with the value the plaintiff hath by his declaration ſet upon them. And the ſame law is ſaid to be, if judgment be given for the plaintiff by *nihil dicit*, *non ſum informatus*, or upon demurrer. Wats. c. 58.

And neither damages nor coſts can be recovered with the treble value; becauſe the ſtatute hath not expreſly given them, except that by the ſtatute of the 8 & 9 W. c. 11. it is enacted, that in all actions of debt upon the ſtatute for not ſetting forth of tithes, wherein the ſingle value or damage found by the jury, ſhall not exceed the ſum of twenty nobles; the plaintiff obtaining judgment,

or

or any award of execution after plea pleaded or demurrer joined therein, ſhall recover his coſts of ſuit; and if the plaintiff ſhall become nonſuit, or ſuffer a diſcontinuance, or a verdict ſhall paſs againſt him, the defendant ſhall recover his coſts.

Shall pay the double value.] See ſect. 2. The reaſon why only the double value is, by this branch to be recovered in the eccleſiaſtical court, where, by the former branch, the parſon, at the common law, ſhall recover the treble, is, for that in the eccleſiaſtical court he ſhall recover the tithes themſelves; and therefore the value recovered in the eccleſiaſtical court is equivalent with the treble forfeiture at the common law. 2 Inſt. 650.

And the double value, together with the ſtatute, ought to be *expreſly* mentioned in the libel: but yet the libel muſt be ſo ordered, as not to be grounded directly upon the ſtatute for more than double value; for if the ſingle damages, that is, the value of the tithes, be alſo grounded upon it, this will be interpreted a ſuing in the ſpiritual court for treble value; and a prohibition will lie. Godb. 245. Gibs. 697.

Over and beſides the coſts, charges, and expences.] So as the ſuit in the eccleſiaſtical court is more advantageous, than the ſuit for the treble forfeiture at the common law. For at the common he ſhall recover no coſts; but he ſhall recover in the eccleſiaſtical court, his coſts, charges, and expences. 2 Inſt. 651.

May be convented.] See ſect. 13. In the caſe of *Machin* and *Molton*, Eaſt. 11. W. 3. it was moved for the diſcharge of a rule by which a prohibition was granted unleſs cauſe ſhewed, to the conſiſtory court of the archbiſhop of York; where *Molton*, rector of the church of *South Collingham*, in the dioceſe of *York*, preferred a libel againſt *Machin*, for ſubtraction of tithes; and the motion for the prohibition was grounded upon a ſuggeſtion, that

Machin lived within the dioceſe of *Lincoln*, and therefore ought not to be cited out of the dioceſe where he lived, by the 23 H. 8. c. 9. And the cauſe which was ſhewed to the court to diſcharge the rule was, becauſe *Machin* had lands within the dioceſe of *York*, namely, in the pariſh of South *Collingham*; for the tithes of corn growing upon which lands, *Molton* libelled in the conſiſtory court of *York*; and when the citation was ſerved, *Machin* was there, tho' he lived generally within the dioceſe of *Lincoln*. And by *Holt* chief juſtice; if a man lives within the dioceſe of A. and occupies lands in the dioceſe of B. if he ſubtracts tithes in B, he may be cited and ſued there; and it is not within the ſaid ſtatute: for when he occupies lands in B, that makes him an inhabitant there, and out of the intent of the ſtatute; and by the ſtatute of the 32 H. 8. c. 7. Sect. 2. The ſuit for withholding of tithes in expreſs words is appointed to be, before the ordinary of the place where the wrong was done. L. Raym. 452, 534.

By two honeſt and ſufficient witneſſes at leaſt.] See Sect. 14. This clauſe was made in favour of the clergy, for proof to be made by witneſſes, which they had not at the common law. But if the ſuggeſtion be in the negative, as, if the proprietary of a parſonage impropriate, ſue for tithes, and the cauſe of the ſuggeſtion be, that the parſonage is not impropriate; or if a parſon ſue for tithes of lands in his pariſh, and the party ſue for a prohibition, for that the land lieth not in that pariſh, or that the parſon that ſueth for tithes was not inducted; or any the like cauſe in the negative of any matter of fact, he ſhall not produce any witneſſes by force of this branch, becauſe a negative cannot be proved: and therefore a prohibition upon cauſes in the negative

negative remains as it was at the common law. 2 Inſt. 662.

Proved true.] It is ſufficient in this caſe, that enough is proved, upon which to ground a prohibition, tho' the ſuggeſtion be not ſhewn to be ſtrictly and wholly true. So, where the ſuggeſtion was for twenty acres of paſture, and as many acres of wood in lieu of tithes, and proof was only made of the wood; or where the ſuggeſtion was for wool and lamb, and the witneſſes only proved as to the lamb; or for a hundred acres, when there were only ſixty; or for twenty ſhillings by way of modus, where the ſum was forty ſhillings; in theſe caſes, the proofs were adjudged to be ſufficient, becauſe enough was proved to ſhew, that the court chriſtian ought not to hold plea thereof. But if proof is neither made of the modus laid, nor of any other modus; then the ſuggeſtion is not proved. Gibs. 699.

As to the clearneſs of the evidence, it is ſufficient in this caſe, if the witneſſes do declare as to the matter of the ſuggeſtion, that they believe it, or have known it ſo, or have heard it, or that there is a common fame of it. Gibs. 699.

Within ſix months.] If there is no certainty in the firſt proof, it cannot be ſupplied by good proof after the ſix months; but if good proof is made within the time, it may be certified after the time. Gibs. 700.

Six months.] That is, ſix kalendar months; and not to be reckoned by twenty eight days to the month. 2 Salk. 554.

Six months next following.] Which muſt be computed from the teſte of the writ; and not ſix months in the term time only, but the vacation ſhall be included as part of the time. 2 Salk. 554. L. Raym. 1172.

Have a conſultation granted.] After which, the party may have a new prohibition upon the ſame libel;

libel; inaſmuch as the ſtatute of the 50 Ed. 3 againſt prohibition after conſultation, extends not to thoſe conſultations which are granted upon the matter of the ſuggeſtion. Gibs. 700.

Contrary to the ſtatute of Weſtminſter the ſecond.] Concerning the writ of *Indicavit*, given by that ſtatute. 2 Inſt. 663.

The ſtatutes of *articuli cleri*, *circumſpecte agatis*, *Sylva Cædua*.] All which, with reſpect to tithes, are ſpecified in this title.

The treatiſe *de regia prohibitione*.] Which is, that which is intitled *prohibitio formata ſuper articulis*. Act. Magn. Chart. part. 2. fol. 7. 2 Inſt. 663.

Nor againſt the ſtatute of the 1 *Ed.* 3. c. 10.] This is miſprinted; for the act is 1 Ed. 3. ſt. 2. c. 11. that if any ſuit be in the ſpiritual court againſt indictors, a prohibition doth lie. 2 Inſt. 663.

Small tithes to be recovered before juſtices of the peace.

By the Stat. 7 & 8 W. 3. c. 6. Sect. 6. For the more eaſy and effectual recovery of ſmall tithes, and the value of them, where the ſame ſhall be unduly ſubtracted and detained, where the ſame do not amount to above the yearly value of forty ſhillings from any one perſon; it is enacted, that all perſons ſhall well and truly ſet out and pay all and ſingular the tithes commonly called ſmall tithes, and compoſitions and agreements for the ſame, with all offerings, oblations, and obventions, to the ſeveral rectors, vicars, and other perſons to whom they ſhall be due in their ſeveral pariſhes, according to the rights, cuſtoms, and preſcriptions commonly uſed within the ſaid pariſhes reſpectively: and if any perſon ſhall ſubtract or withdraw, or any ways fail in the true payment of ſuch ſmall tithes, offerings, oblations, obventions, or compoſitions, by the ſpace of twenty days at moſt after demand thereof; it ſhall be lawful for the perſon to whom the

ſame

ſame ſhall be due, to make his complaint in writing to two or more juſtices of the peace, within that county, place or diviſion where the ſame ſhall grow due, neither of which juſtices is to be patron of the church or chapel whence the ſaid tithes ſhall ariſe, nor any ways intereſted in ſuch tithes, offerings, oblations, obventions or compoſitions aforeſaid.

Juſtices to ſummon the party, &c.

Sect. 2. And on ſuch complaint, the ſaid juſtices ſhall ſummon in writing under their hands and ſeals, by reaſonable warning, every ſuch perſon againſt whom ſuch complaint ſhall be made; and after his appearance, or upon default of appearance, the ſaid warning or ſummons being proved before them upon oath, the ſaid juſtices ſhall proceed to hear and determine the ſaid complaint; and upon the proofs, evidences, and teſtimonies produced before them, ſhall in writing under their hands and ſeals adjudge the caſe, and give ſuch reaſonable allowance and compenſation for ſuch tithes, oblations and compoſitions ſo ſubtracted or withheld, as they ſhall judge to be juſt and reaſonable, and all ſuch coſts and charges, not exceeding ten ſhillings, as upon the merits of the cauſe, ſhall appear juſt.

If the ſum adjudged be not paid in ten days, it ſhall be levied by diſtreſs.

Sect. 3. And if any perſon ſhall refuſe or neglect, for the ſpace of ten days after notice given, to pay or ſatisfy any ſuch ſum of money, as upon ſuch complaint and proceeding, ſhall by two ſuch juſtices be adjudged as aforeſaid; in every ſuch caſe the conſtables and church-wardens of the ſaid pariſh, or one of them, ſhall by warrant under the hands and ſeals of the ſaid juſtices to them directed, diſtrain the goods and chattles of the party ſo refuſing or neglecting as aforeſaid; and after detaining them [not leſs than four days, nor more than eight, by 27 G. 2. c. 20.] in caſe the ſaid ſum ſo adjudged, together with

with reaſonable charges of making and detaining the ſaid diſtreſs, be not tendered or paid by the ſaid party in the mean time, ſhall make public ſale thereof, and pay to the party complaining ſo much of the money ariſing by ſuch ſale, as may ſatisfy the ſaid ſum ſo adjudged, retaining to themſelves ſuch reaſonable charges for making and keeping the ſaid diſtreſs as the ſaid juſtices ſhall think fit [and alſo deducting their reaſonable charges of ſelling the ſaid diſtreſs; returning the overplus (if any ſhall be) to the owner upon demand. 27 G. 2 c. 20.]

Sect. 4. And the ſaid juſtices ſhall have power to adminiſter an oath.

Proviſo for the city of London.

Sect. 5. Provided, that this act ſhall not extend to any tithes, oblations, payments, or obventions, within the city of London or liberties thereof; nor to any other city or town corporate where the ſame are ſettled by act of parliament.

Complaints to be made in two years.

Sect. 6. And no complaint ſhall be heard and determined by the ſaid juſtices, unleſs the complaint ſhall be made within two years next after the time that the ſame tithes, oblations, obventions, and compoſitions did become due.

Appeal from the two juſtices to the quarter ſeſſions.

Sect. 7. Provided alſo, that any perſon finding himſelf aggrieved by any judgment to be given by ſuch two juſtices, may appeal to the next general quarter ſeſſions to be held for that county or other diviſion; and the juſtices there ſhall proceed finally to hear and determine the matter; and to reverſe the ſaid judgment, if they ſhall ſee cauſe; and if they ſhall find cauſe to confirm the ſaid judgment, they ſhall decree the ſame by order of ſeſſions, and ſhall alſo proceed to give ſuch coſts againſt the appellant, to be levied by diſtreſs and ſale of the goods and chattles of the ſaid appellant, as to them ſhall ſeem juſt and reaſonable, and no proceedings or judgment had by virtue of this act, ſhall be removed or ſuperſeded

ſeded by any writ of *certiorari*, or other writ out of his majeſty's courts at Weſtminſter, or any other court, unleſs the title of ſuch tithes, oblations or obventions ſhall be in queſtion.

What to be done, if preſcription, compoſition, or modus be inſiſted on.

Sect. 8. Provided, that where any perſon complained of for ſubtracting or withholding any ſmall tithes or other duties aforeſaid, ſhall, before the juſtices to whom ſuch complaint is made, inſiſt upon any preſcription, compoſition, or *modus decimandi*, agreement, or title, whereby he ought to be freed from payment of the ſaid tithes or other dues in queſtion, and deliver the ſame in writing to the ſaid juſtices ſubſcribed by him; and ſhall then give to the party complaining, reaſonable and ſufficient ſecurity to the ſatisfaction of the ſaid juſtices, to pay all ſuch coſts and damages, as upon a trial at law to be had for that purpoſe in any of his majeſty's courts, having cognizance of that matter, ſhall be given againſt him in caſe the ſaid preſcription, compoſition, or *modus decimandi*, ſhall not, upon the ſaid trial, be allowed; in that caſe, the ſaid juſtices ſhall forbear to give any judgment in the matter; and then and in ſuch caſe, the party complaining ſhall be at liberty to proſecute ſuch perſon for his ſaid ſubtraction, in any other court where he might have ſued before the making of this act.

Every judgment given by the juſtices ſhall be inrolled at the quarter-ſeſſions.

Sect. 9. And every perſon who ſhall by virtue of this act obtain any judgment, or againſt whom any judgment ſhall be obtained, before any juſtices of the peace out of ſeſſions, for ſmall tithes, oblations, obventions or compoſitions, ſhall cauſe or procure the ſaid judgment to be inrolled at the next general quarter ſeſſions, to be held for the ſaid county or other diviſion; and the clerk of the peace ſhall, upon tender thereof, inroll the ſame, and ſhall not receive for the inrollment of any one judgment, any fee or reward exceeding one

one ſhilling; and the judgment ſo inrolled, and ſatisfaction made by paying the ſum adjudged, ſhall be a good bar to conclude the ſaid rectors, vicars and other perſons, from any other remedy for the ſaid ſmall tithes, oblations, obventions, or compoſitions, for which the ſaid judgment was obtained.

Money adjudged may be levied in another county.

Sect. 10. And if any perſon againſt whom ſuch judgment ſhall be had, ſhall remove out of the county or other diviſion before the levying of the ſum adjudged; the juſtices who made the judgment, or one of them, ſhall certify the ſame, under hand and ſeal, to any juſtice of ſuch other county or place wherein the ſaid perſon ſhall be an inhabitant; who ſhall, by warrant under his hand and ſeal, to be directed to the conſtables or church-wardens of the place, or one of them, levy the ſum ſo adjudged to be levied, upon the goods and chattles of ſuch perſon, as fully as the ſaid other juſtice might have done, if he had not removed as aforeſaid.

Juſtices may give coſts not exceeding 10s. to the party proſecuted.

Sect. 12. And the juſtices who ſhall hear and determine any of the matters aforeſaid, ſhall have power to give coſts, not exceeding ten ſhillings, to the party proſecuted, if they ſhall find the complaint to be falſe, and vexatious; to be levied in manner and form aforeſaid.

Sect. 13. And if any perſon ſhall be ſued for any thing done in the execution of this act, and the plaintiff in ſuch ſuit ſhall diſcontinue his action, or be non-ſuit, or a verdict paſs againſt him; ſuch perſon ſhall recover double coſts.

Sect. 14. Provided, that any clerk or other perſon, who ſhall begin any ſuit for recovery of ſmall tithes, oblations, or obventions, not exceeding the value of forty ſhillings, in his majeſty's court of Exchequer, or in any the eccleſiaſtical courts, ſhall have no benefit by this

this act for the ſame matter for which he hath ſo ſued.

By the Stat. 7 & 8 W. c. 34. Whereas by reaſon of a pretended ſcruple of conſcience, Quakers do refuſe to pay tithes and church rates; it is enacted, that where any Quaker ſhall refuſe to pay or compound for his great or ſmall tithes, or to pay any church rates, it ſhall be lawful for the two next juſtices of the peace of the ſame county (other than ſuch juſtice as is patron of the church or chapel, whence the ſaid tithes ſhall ariſe, or any ways intereſted in the ſaid tithes,) upon the complaint of any perſon, vicar, farmer, or proprietor of tithes, church-warden or church-wardens, who ought to have, receive, or collect the ſame, by warrant under hands and ſeals, to convene before them ſuch Quaker or Quakers neglecting or refuſing to pay or compound for the ſame, and to examine upon oath (or affirmation, in caſe of the examination of a Quaker) the truth and juſtice of the ſaid complaint, and to aſcertain and ſtate what is due and payable; and by order under their hands and ſeals, to direct and appoint the payment thereof, ſo as the ſum ordered do not exceed ten pounds; and upon refuſal to pay according to ſuch order, it ſhall be lawful for any one of the ſaid juſtices, by warrant under his hand and ſeal, to levy the ſame by diſtreſs and ſale of the goods of ſuch offender, his executors or adminiſtrators, rendering only the overplus to him or them, the neceſſary charges of diſtraining being thereout firſt deducted and allowed by the ſaid juſtice. And any perſon finding himſelf aggrieved by any judgment given by ſuch two juſtices, may appeal to the next general quarter-ſeſſions to be held for the county, riding, city, liberty, or town corporate; and the juſtices there ſhall proceed finally to hear and determine the matter, and to reverſe the ſaid judgment,

Tithes of Quakers to be recovered before juſtices of the peace.

judgment, if they ſee cauſe; and if they ſhall find cauſe to continue the ſaid judgment, they ſhall then decree the ſame by order of ſeſſions, and ſhall alſo proceed to give ſuch coſts againſt the appellant, to be levied by diſtreſs and ſale of the goods and chattles of the ſaid appellant, as to them ſhall ſeem juſt and reaſonable; and no proceedings or judgment had by virtue of this act, ſhall be removed or ſuperſeded by any writ of *certiorari* or other writ out of his majeſty's courts at Weſtminſter, or any other court whatſoever, unleſs the title of ſuch tithes ſhall be in queſtion.

Sect. 5. Provided, that in caſe any ſuch appeal be made as aforeſaid, no warrant of diſtreſs ſhall be granted until after ſuch appeal be determined.

And by the Stat. 1 Geo 1. ſt. 2. c. 6. Sect. 2. The like remedy ſhall be had againſt any Quaker or Quakers, for the recovering of any tithes or rates, or any cuſtomary or other rights, dues or payments, belonging to any church or chapel, which of right by law and cuſtom ought to be paid, for the ſtipend or maintainance of any miniſter or curate officiating in church or chapel; and any two or more juſtices of the peace of the ſame county or place (other than ſuch juſtice as is patron of any ſuch church or chapel, or any ways intereſted in the ſaid tithes), upon complaint of any parſon, vicar, curate, farmer or proprietor of ſuch tithes, or any church-warden or chapel-warden, or other perſon who ought to have, receive, or collect any ſuch tithes, rates, dues or payments as aforeſaid, are authorized and required to ſummon, in writing under their hands and ſeals, by reaſonable warning, ſuch Quaker or Quakers, againſt whom ſuch complaint ſhall be made; and after his or their appearance, or upon default of appearance, the ſaid warning or ſummons being proved

proved before them upon oath, to proceed to hear and determine the ſaid complaint; and to make ſuch order therein as in the aforeſaid act is limited; and alſo to order ſuch coſts and charges as they ſhall think reaſonable, not exceeding ten ſhillings, as upon the merits of the cauſe ſhall appear juſt: which order ſhall and may be ſo executed, and on ſuch appeal may be reverſed or affirmed by the general quarter ſeſſions, with ſuch coſts and remedy for the ſame; and ſhall not be removed into any other court, unleſs the titles of ſuch tithes, dues, or payments ſhall be in queſtion; in like manner as by the aforeſaid act is limited and provided.

And by the Stat. 27 Geo. 2. c. 20. which directs in what manner diſtreſſes ſhall be made by juſtices of the peace, and which gives to the juſtices power to order the goods diſtrained to be kept for a certain time before they be ſold, and gives power alſo to the officers making the diſtreſs to deduct their reaſonable charges, it is provided, that the ſame ſhall not extend to alter any proviſions relating to diſtreſſes to be made for the payment of tithes and church rates by the people called Quakers, contained in the acts of the 7 & 8 W. c. 34, and the 1 Geo. ſt. 2. c. 6.

In the caſe of the king againſt *Roger Wakefield* and others, Hil. 31 G. 2. An order of two juſtices was made againſt three perſons, being Quakers, on the 1 Geo. 1. ſt. 2. c. 6. for the payment of certain cuſtomary payments, called *chapel ſalary*, to the reverend Mr. *Smith*, curate of the chapel of *Burniſide* in *Weſtmorland*, where the ſaid Quakers had eſtates chargeable with the ſaid payments. On appeal to the ſeſſions, the order was confirmed. The Quakers moved for a *certiorari*, and tho' cauſe was ſhewn againſt the iſſuing of it, yet a *certiorari* was granted; and the return filed, and exceptions were taken to it, and argued

at the bar. Lord Mansfield chief juſtice delivered the opinion of the court: that the *certiorari* ought not to have iſſued at all; that the return ſhould be taken off the file, and all proceedings thereon fall to the ground, and that the orders of the juſtices and ſeſſions ſhould be remanded. The order of the juſtices (he obſerved) was made on the ſtatute of the 1 Geo. 1. ſt. 2. c. 6. which extends the 7 & 8 W. c. 3. 4. concerning tithes, to all cuſtomary payments due to clergymen. Theſe two acts are to be taken together as one law. They were intended for the benefit of the Quakers; to prevent their being liable to expenſive ſuits for refuſing to pay tithes upon ſcruples of conſcience, by giving an apparent compulſory method of levying tithes and other cuſtomary payments in a ſummary way. This proceeding cannot be removed by *certiorari*, unleſs the title to theſe cuſtomary payments comes in queſtion: and on this proviſo the preſent queſtion ariſes. The affidavits read on the original motion for the *certiorari* ſet forth, that before the juſtices and the ſeſſions, the defendants controverted the right of the curate to theſe cuſtomary payments. The affidavits againſt the *certiorari* ſay, that theſe payments have been paid from time immemorial; that no inhabitant ever diſputed it but theſe Quakers; that they have enjoyed the meſſuages but a few years, and that the former inhabitants never diſputed the right of the parſon. Taking theſe affidavits together, it is clear that the Quakers controverted the right to the cuſtomary payments only as all Quakers controvert the payment of all dues to all clergymen upon ſcruple of conſcience, which is the caſe directly within the act, and the proceeding muſt therefore follow the directions of the act. The Quakers themſelves have acknowledged the juriſdiction of the juſtices, by appealing to the ſeſſions; whereas

had

had they intended to diſpute the title to theſe cuſtomary payments, they would at firſt have removed the order of the two juſtices by *certiorari*. The only difficulty remaining ariſes from the return being already filed. But there are ſeveral inſtances of this court ſuperſeding a *certiorari* after the return filed: as where an order of juſtices is removed, and it appears upon the return, that the parties had a right to appeal to the ſeſſions, and that the time for appealing was not expired when the *certiorari* iſſued; in ſuch a caſe, this court ſuperſedes the writ of *certiorari*, *quia improvide emanavit*; the ſame muſt be done in the preſent caſe. 2 B. E. L. 458.

Tithes ſet out and ſevered from the nine parts, become lay chattles, and muſt be ſued for in the temporal courts only. See page 128.

And judgment of *præmunire* hath been given againſt a man, for ſuing in the ſpiritual court for tithes, alleging the ſame to be ſevered from the nine parts. 3 Inſt. 121.

Notwithſtanding all theſe ſtatutes, tithes, (if of any conſiderable value) are now generally ſued for in the courts of equity by Engliſh bill, and for the moſt part in the Exchequer; but not upon the ſtatute for treble or double value: for there can be no ſuit in equity for the recovery of the double or treble value. Wood b. 2. c. 2 Will. 463.

If the incumbent dieth, his executor may recover the tithes which became due in the teſtator's life time; but he is not intitled to the treble value upon the ſtatute. 1 Vern. 60.

A rector agreed with his pariſhioner for tithes, for a certain ſum payable yearly at Michaelmas. The rector died about a month before Michaelmaſs. The agreement determining by the death of the parſon, the ſucceſſor ſhall be intitled to tithes in kind only from the death, and the executor

of the laſt incumbent to a proportion, according to the agreement, till the time of the teſtator's death: and this is by an equitable conſtruction. Bunb. 294.

Where tenants for life die, before the rent is payable, rent may be recovered from under-tenant.

By the ſtatute of the 11 Geo. 2. c. 19. ſect. 15. "Whereas, where a leſſor or landlord having only "an eſtate for life in the lands, tenements, or he-"reditaments demiſed, happens to die before or "on the day on which any rent is reſerved or made "payable, ſuch rent, or any part thereof, is not "by law recoverable by the executors or admi-"niſtrators of ſuch leſſor or landlord; nor is the "perſon in reverſion intitled thereto, any other "than for the uſe and occupation of ſuch lands, "tenements, or hereditaments, from the death of "the tenant for life; of which, advantage hath "been often taken by the under-tenants, who "thereby avoid paying any thing for the ſame: "for remedy thereof, it is enacted, that where "any tenant for life ſhall happen to die before or "on the day on which any rent was reſerved, or "made payable, upon any demiſe or leaſe of any "lands, tenements, or hereditaments, which de-"termined on the death of ſuch tenant for life; "the executors or adminiſtrators of ſuch tenant "for life, ſhall and may, in an action on the caſe, "recover of and from ſuch under-tenant of ſuch "lands, tenements, or hereditaments, if ſuch te-"nant for life die on the day on which the ſame "was made payable, the whole, or if before ſuch "day, then a proportion of ſuch rent, according "to the time ſuch tenant for life lived, of the "laſt year, or quarter of a year, or other time in "which the ſaid rent was growing due as afore-"ſaid; making all juſt allowances, or a propor-"tionable part thereof reſpectively."

Stat. 5 Geo. 3. c. 17. intitled, an act to confirm all leaſes already made by archbiſhops and biſhops, and other eccleſiaſtical perſons, of tithes and other incorporeal

incorporeal hereditaments, for one, two, or three lives, or twenty one years; and to enable them to grant ſuch leaſes, and to bring actions of debt for recovery of rents reſerved and in arrear, on leaſes for life or lives.

Sect. 1. Whereas it may be doubtful whether, by the laws now in force, archbiſhops or biſhops, maſter and fellows, or any other head and members of colleges or halls, deans and chapters, precentors, prebendaries, maſters and guardians of hoſpitals, or any other perſon or perſons having any ſpiritual or eccleſiaſtical promotions, heretofore had, or now have, any power to make or grant any leaſe or leaſes of tithes, or other incorporeal hereditaments only, which lie in grant and not in livery, for one, two, or three lives, or for any term or terms of years not exceeding twenty one years, although the ancient rent, or yearly ſum, is thereby mentioned to be reſerved; and all other requiſites preſcribed by the acts of parliament now in being to that end, or any of them, were or are juſtly and truly obſerved and performed, by reaſon that there is generally no place wherein a diſtreſs can be had or taken for ſuch rent or yearly ſum; and it may be alſo doubtful, whether, in caſes of ſuch leaſes for life or lives, there is any remedy in law for ſuch eccleſiaſtical or other perſons, by action of debt or otherwiſe, for recovering the rent or yearly ſum due and arrear, which is mentioned to be reſerved on ſuch leaſes for life or lives; therefore, for obviating all doubts touching the ſame, and enabling the ſaid archbiſhops and biſhops, maſters and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, maſters and guardians of hoſpitals, and other eccleſiaſtical perſons, to make valid leaſes of ſuch their incorporeal hereditaments, and to recover the rent or yearly ſum mentioned to be reſerved on any leaſes by them already granted, or

to be granted, for any one, two, or three lives, as aforeſaid; and alſo to make good and effectual all ſuch leaſes as have already been granted by them: be it therefore enacted, &c. that all leaſes for one, two, or three life or lives, or any term not exceeding twenty one years, already made and granted, or which ſhall at any time from and after the paſſing this act be made or granted, of any tithes, tolls, or other incorporeal hereditaments, ſolely, and without any lands or corporeal hereditaments, by any archbiſhop or biſhop, maſter and fellows, or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, maſters and guardians of hoſpitals, and every other perſon and perſons, who are enabled by the ſeveral ſtatutes now in being, or any of them, to make any leaſe or leaſes, for one, two, or three life or lives, or any term or number of years not exceeding twenty one, of any lands, tenements, or other corporeal hereditaments, ſhall be, and are hereby deemed and declared to be, as good and effectual in law againſt ſuch archbiſhop, biſhop, maſter and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebenbaries, maſters and guardians of hoſpitals, and other perſons ſo granting the ſame, and their ſucceſſors, and every of them, to all intents and purpoſes, as any leaſe or leaſes already made or to be made, by any ſuch archbiſhop or biſhop, maſter and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, maſters and guardians of hoſpitals, and other perſons having ſpiritual promotion, of any lands or other corporeal hereditaments, now are, by virtue of the ſtatute of the thirty ſecond year of king Henry the Eighth, or any other ſtatute now in being; any law, cuſtom, or uſage, to the contrary thereof, in any wiſe notwithſtanding.

Leaſe of tithes, &c. made by eccleſiaſtical perſons, declared to be good in law.

Sect.

Sect. 2. Provided always, that nothing herein contained ſhall extend, or be conſtrued to extend, to enable any maſter and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, maſters and guardians of hoſpitals, or other eccleſiaſtical perſons as aforeſaid, to grant leaſes for any longer or other terms than, by the local ſtatutes of their ſeveral foundations, they are now reſpectively enabled to do. But maſters and fellows of colleges are diſabled, &c.

Sect. 3. And in caſe the rent or rents, yearly ſum or ſums, reſerved or made payable in or by any leaſe or leaſes already made, or to be made, by any archbiſhop or biſhop, maſter and fellows, or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, maſters and guardians of hoſpitals, and every other perſon and perſons ſo enabled to make leaſes as aforeſaid, for one, two, or three life or lives, or years, in purſuance of the ſeveral acts of parliament already in being, or by this preſent act, or any part thereof, ſhall be behind or unpaid by the ſpace of twenty-eight days next over, or after any of the days, whereon the ſame, by ſuch leaſe or leaſes, now are, or hereafter ſhall or may be reſerved and made payable; then, and ſo often, and from time to time, as it ſhall ſo happen, it ſhall and may be lawful for ſuch archbiſhop or biſhop, maſter and fellows, or other head and members of colleges or halls, deans and chapters, prebendaries, precentors, maſters and guardians of hoſpitals, and other perſons ſo making or granting, or having made or granted, ſuch leaſes as aforeſaid, or their executors, adminiſtrators, and ſucceſſors reſpectively, to bring an action or actions of debt againſt the leſſee or leſſees, to whom any ſuch leaſe or leaſes, for life or lives, or years, now are, or hereafter ſhall be made and granted, his, her, or their heirs, executors, adminiſtrators, or aſſigns, Actions may be brought for recovery of rent reſerved on ſuch leaſes.

aſſigns, for recovering the rent or rents which ſhall be then due and in arrear, to any ſuch archbiſhop or biſhop, maſters and fellows, or other heads and members of colleges or halls, deans, chapters, precentors, prebendaries, maſters and guardians of hoſpitals, and other perſon or perſons before mentioned, his or their executors, adminiſtrators, or ſucceſſors, in ſuch and the ſame manner, as fully and effectually to all intents and purpoſes, as any landlord or leſſor, or other perſon or perſons, could or might do for recovering of arrears of rent, due on any leaſe or leaſes for life or lives, or years, by the laws now in being; any law, ſtatute, uſage, or cuſtom, to the contrary notwithſtanding.

Sect. 4. And this act ſhall be deemed and taken to be a public act; and ſhall be judicially taken notice of as ſuch, in all courts of law and equity, without ſpecially pleading the ſame.

CHAP. VII.

Of the manner of paying tithes, and the ſums payable by the reſpective pariſhes in London.

STAT. 22 & 23 Car. 2. cap. 15. An act for the better ſettlement of the maintenance of the parſons, vicars, and curates, in the pariſhes of the city of London. "Whereas the tithes in the "city of London, were levied and paid with great "inequality, and are ſince the late dreadful fire "there, in the rebuilding of the ſame, by taking "away of ſome houſes, altering the foundation of "many, and the new erecting of others, ſo diſ-"ordered, that in caſe they ſhould not for the "time to come, be reduced to a certainty, many "controverſies and ſuits of law might thence ariſe; "it is therefore enacted, that the annual certain "tithes of the pariſhes within the ſaid city, and

"liberties

" liberties thereof, whoſe churches have been de-
" moliſhed, or in part conſumed by the late fire,
" and which ſaid pariſhes, by virtue of an act of
" this preſent parliament, remain and continue
" ſingle, as heretofore they were; or are by the
" ſaid act annexed or united into one pariſh reſ-
" pectively, ſhall be as followeth: that is to ſay,
" the annual certain tithes or ſum of money in
" lieu of tithes;" of

	£	s
The pariſh of Alhallows, Lombard-ſtreet	110	0
St. Bartholomew, Exchange —	100	0
St. Bridget, *alias* Brides —	120	0
St. Bennet Finck — —	100	0
St. Michael, Crooked-lane ——	100	0
St. Chriſtopher — — —	120	0
St. Dionis Backchurch —	120	0
St. Dunſtan in the Eaſt — —	200	0
St. James, Garlick-hythe —	100	0
St. Michael, Cornhill — —	140	0
St. Michael, Baſſiſhaw ——	132	11
St. Margaret, Lothbury —	100	0
St. Mary, Aldermanbury —	150	0
St. Martin, Ludgate ——	160	0
St. Peter, Cornhill ——	110	0
St. Stephen, Coleman-ſtreet —	110	0
St. Sepulchre —— ——	200	0
St. Alhallows, Bread-ſtreet, and St. John Evangeliſt ——	140	0
Alhallows the Great, and Alhallows the Leſs — ——	200	0
St. Alban, Wood-ſtreet, and St. Olaves, Silver-ſtreet ——	170	0
St. Anne and Agnes, and St. John Zachary	140	0
St. Auguſtine, and St. Faith —	172	0
St. Andrew Wardrobe, and St. Anne, Black-friars ——	140	0
St. Antholin, and St. John Baptiſt	120	0

St.

	£.
St. Bennet, Grace-church, and St. Leonard, Eaſt-cheap	140
St. Bennet, Paul's-wharf, and St. Peter's, Paul's-wharf	100
Chriſt-church, and St. Leonard, Foſter-lane	200
St. Edmond the King, and St. Nicholas Acons	180
St. George, Botolph-lane, and St. Botolph, Billingſgate	180
Lawrence Jury, and St. Magdalen, Milk ſtreet	120
St. Magnus, and St. Margaret, New Fiſh-ſtreet	170
St. Michael Royal, and St. Martin Vintry	140
St. Matthew, Friday-ſtreet, and St. Peter Cheap	150
St. Margaret Pattons, and St. Gabriel Fenchurch	120
St. Mary at Hill, and St. Andrew Hubbard	200
St. Mary Woolnoth, and St. Mary Woolchurch	160
St. Clement Eaſtcheap, and St. Martin Orgars	140
St. Mary Ab-church, and St. Lawrence Pountney	120
St. Mary Aldermary, and St. Thomas Apoſtle	150
St. Mary le Bow, St. Pancras, Super-lane, and Alhallows, Honey-lane.	200
St. Mildred Poultry, and St. Mary Colechurch,	170
St. Michael, Wood-ſtreet, and St. Mary Staining	100
St. Mildred, Bread-ſtreet, and St. Margaret Moſes	130
St. Michael, Queenhithe, and Trinity	160
St. Magdalen, Old Fiſh-ſtreet, and S. Gregory	120
St. Mary Sommerſet, and St. Mary Mounthaw	110
St. Nicholas, Cole-abbey, and St. Nicholas, Olaves	130
St. Olave, Jewry, and St. Martin, Ironmonger-lane	120
St. Stephen, Walbrook, and St. Bennet, Sheerhogg	100
St. Swythin, and St. Mary Bothaw	140
St. Vedaſt *alias* Foſter's, and St Michael Quern	160

Sect.

Sect. 3. Which reſpective ſums of money ot be paid in lieu of tithes within the ſaid reſpective pariſhes, and aſſeſſed as hereinafter is directed, ſhall be the reſpective certain, annual maintenance (over and above glebes and perquiſites, gifts and bequeſts to the reſpective parſon, vicar and curate of any pariſh for the time being, or to their ſucceſſors reſpectively, or to others for their uſe) of the ſaid reſpective parſons, vicars and curates, who ſhall be legally inſtituted; inducted, and admitted into the reſpective pariſhes aforeſaid.

Sect. 4, 5, 6, 7. And for the more equal levying of the ſame upon the ſeveral houſes, buildings, and other hereditaments within the reſpective pariſhes, aſſeſſments were ordered to be made before July 24, 1671, upon all houſes, ſhops, warehouſes, and cellars, wharfs, keys, cranes, water-houſes, tofts of ground (remaining unbuilt,) and all other hereditaments whatſoever (except parſonage and vicarage houſes,) the whole reſpective ſum by this act appointed, or ſo much of it as is more than what each impropriator is by this act injoined to allow.

Sect. 8. And three tranſcripts of the aſſeſſments were to be made; one to be depoſited amongſt the records of the city, another in the regiſtry of the biſhop of London, and another in the pariſh veſtry reſpectively, for a perpetual memorial thereof.

Sect. 9. The ſums aſſeſſed to be paid to the reſpective parſons, vicars and curates, at the four moſt uſual feaſts, to wit, at the annunciation of the bleſſed Virgin, the nativity of St. John Baptiſt, the feaſt of St. Michael, the Arch Angel, and the nativity of our bleſſed Saviour, or within fourteen days after each of the feaſts aforeſaid, by equal payments; the reſpective payments thereof to begin and commence only from ſuch time

time as the incumbent ſhall begin to officiate or preach as incumbent.

Sect. 10. Impropriators ſhall pay what *bona fide* they have uſed and ought to pay to the reſpective incumbents at any time before the ſaid late fire; the ſame to be computed as part of the maintenance of ſuch incumbent.

Sect. 11. And if any inhabitant ſhall refuſe or neglect to pay to the incumbent the ſum appointed by him to be paid, (the ſame being lawfully demanded upon the premiſſes;) it ſhall be lawful for the lord Mayor, upon oath to be made before him of ſuch refuſal or neglect, to grant out warrants for the officer or perſon appointed to collect the ſame, with the aſſiſtance of a conſtable, in the day time, to levy the ſame by diſtreſs and ſale of the goods of the party ſo refuſing or neglecting; reſtoring to the owner the overplus over and above the ſaid arrears, and the reaſonable charges of making ſuch diſtreſs.

Sect. 12. And if the lord mayor ſhall refuſe or neglect to execute any of the powers to him given by this act; it ſhall be lawful for the lord chancellor or lord keeper, or two or more of the barons of the Exchequer, by warrant under their hands and ſeals reſpectively, to do and perform what the ſaid lord mayor might or ought to have done in the premiſſes.

Sect. 14. Provided, that no court or judge eccleſiaſtical or temporal, ſhall hold plea of or for any the ſum or ſums of money due and owing, or to be paid by virtue of this act; other than the perſons hereby authorized to have cognizance thereof: nor ſhall it be lawful to or for any parſon, vicar, curate, or incumbent, to convent or ſue any perſon aſſeſſed as aforeſaid, and refuſing or neglecting to pay the ſame in any court or courts, or before any judge or judges, other than what are authorized and appointed by this act,

act, for the hearing and determining of the ſame, in manner aforeſaid.

Sect. 15. Provided alſo, that it ſhall be lawful for the wardens and minors, canons of St. Paul's, parſon and proprietors of the rectory of the pariſh of St. Gregory aforeſaid, to receive and enjoy all tithes, oblations, and duties, ariſing or growing due within the ſaid pariſh, in as large and beneficial manner as formerly they have or lawfully might have done.

And for the better recovering the ſums of money which ſhall be due according to the directions of this act, and for the levying of arrears where the occupier removes from the premiſſes, or the houſes have ſtood empty, a decree was made in the year 1713, by Harcourt lord chancellor, aſſiſted by the barons Bury and Price, in the caſe, of Savage and Wood clerks, againſt Harding and others. Shaw's Par. L 45.

For the ſtipends of the miniſters of the fifty new churches, proviſion is made by the ſeveral acts of parliament relating thereunto, to be raiſed from the duties on coals.

FINIS.

BOOKS just Published,
By W. GRIFFIN, in Fetter-Lane.

1. ESSAYS, Written on various Occaſions.
By Mr. GOLDSMITH,
Author of the TRAVELLER, a POEM. Price 3*s.*

2. The LAWS againſt FORESTALLING, INGROSSING and MONOPOLIZING.
Compiled for the Uſe of the Magiſtrates in Town and Country.
By STEPHEN BROWNE, Eſq.
Judge of his Majeſty's Court of ADMIRALTY; and one of the Juſtices of the Grand Court, in JAMAICA. Price 2*s.* 6*d.*

3. The Fifth Edition of
EVERY MAN HIS OWN PHYSICIAN.
Being a complete Collection of *efficacious* and *approved Remedies*, for almoſt every Diſeaſe incident to the HUMAN BODY. With plain Inſtructions for their common Uſe.
By JOHN THEOBALD, M. D.
Author of the MEDULLA MEDICINÆ,
Compiled at the Command of his Royal Highneſs the DUKE of CUMBERLAND. Price 1*s.* 6*d.*